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**United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court**

Rome, Italy
15 June-17 July 1998

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20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 17th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Thursday, 25 June 1998, at 6 p.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item

Paragraphs

- | | |
|----|---|
| 11 | Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (<i>continued</i>) |
|----|---|

1-7

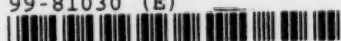
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V.98-57470 (E)

99-81030 (E)



The meeting was called to order at 6 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1)

Part 5 of the draft Statute

1. **The CHAIRMAN** invited the Chairman of the Working Group on Procedural Matters to introduce the Working Group's report concerning the articles in Part 5 of the draft Statute.
2. **Ms. FERNANDEZ de GURMENDI** (Argentina), Chairman of the Working Group on Procedural Matters, introducing the report (A/CONF.183/C.1/WGPM/L.2), said that although the Group had not been able to reach agreement on all the paragraphs of the articles contained in Part 5, it had agreed on most of them. In certain cases it had been decided to divide up the existing text into shorter articles, with the result that Part 5 now had more articles than before.
3. She drew attention to certain corrections to be made in document A/CONF.183/C.1/WGPM/L.2*, reflecting agreement reached since the finalization of the document.
4. In order to facilitate the work of the Drafting Committee, she would like to draw attention to the fact that the Working Group had decided to substitute the word "charges" for the word "indictment" and to replace the term "suspect" with a formulation which would be clearer for the various legal systems which would have to interpret the Statute, such as "person in respect of whom there are grounds to believe that he or she has committed a crime". She also wished to point out that the use of the expression "reasonable basis" in paragraph 1 of article 54 and the use of the expression "sufficient basis" in paragraph 3 was not an accidental inconsistency, but rather the result of a deliberate decision on the part of the Working Group following discussion of the issues involved. Similarly, the decision to divide up certain articles and to combine certain paragraphs had been taken after long discussion, with a view to achieving a delicate balance on a number of substantive issues.
5. She thanked all delegations for their cooperation, and hoped that the texts being submitted would meet with the approval of the Committee.
6. **The CHAIRMAN** said he took it that it was the wish of the Committee to refer the report of the Working Group to the Drafting Committee.
7. *It was so decided.*

The meeting rose at 6.20 p.m.

* See document A/CONF.183/C.1/WGPM/L.2/Corr.1, circulated subsequently.



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A/CONF.183/C.1/SR.18
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 18TH MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Monday, 29 June 1998, at 10 a.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

<i>Agenda item</i>		<i>Paragraphs</i>
11	Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (<i>continued</i>)	1-146

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99-81036 (E)





The meeting was called to order at 10.25 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr. 1; A/CONF.183/C.1/L.16)

Parts 11 and 12 of the draft Statute

1. **Mr. RAMA RAO** (India), Coordinator for Parts 11 and 12, said that Part 11 consisted of article 102. With respect to paragraph 1, he suggested that the Committee of the Whole should focus on the question of which States should be members or observers in the Assembly of States Parties. By way of an analogy, he noted that several States not yet parties to the Law of the Sea Convention took part in meetings of the States parties to the Convention as observers.
2. In paragraph 2, which dealt with the functions of the Assembly, some subparagraphs or parts of subparagraphs were in square brackets.
3. Paragraph 2 (a) referred to the preparatory commission whose establishment was proposed (see document A/CONF.183/2/Add.1, annex).
4. On paragraph 2 (d), he said that it was considered that the Assembly should approve the budget of the Court, while the budget estimates could be prepared by the Court itself. Paragraph 2 (e) dealt with the possibility that additional judges might be required. Paragraph 2 (f), on matters relating to non-cooperation, would have to be coordinated with article 86, in Part 9 of the draft Statute. Paragraph 2 (g) covered possible future functions of the Assembly which could not be foreseen at present.
5. Paragraph 3 dealt with the Bureau of the Assembly. On 3 (a), a decision was needed as to what the number of members should be. It had also been suggested that there should be more than one Vice-President. The criteria for election of the Bureau (3 (b)) might be considered in the light of decisions taken concerning other bodies mentioned in the Statute.
6. Paragraph 3 (c) referred to other subsidiary bodies that might be established by the Assembly. A decision was needed as to whether any oversight mechanism should deal with all the operations of the Court or only with non-judicial administration.
7. Paragraph 4 mentioned the possibility of holding special sessions of the Assembly, and the question was whether they could be convened by the Bureau or should be convened only at the request of one third of the States parties.
8. Paragraph 6 was in square brackets. It dealt with loss of voting rights by States failing to pay contributions and would be subject to finalization of the provisions on the financing of the Court.
9. Turning to Part 12 ("Financing of the Court"), he said that article 104 dealt with the funds of the Court, and there were three options. According to option 1, the funds would comprise assessed contributions made by States parties. Under option 2, the expenses of the Court would be borne by the United Nations, subject to the approval of the General Assembly. That would imply that not only the States parties to the Statute but all Members of the

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United Nations would be contributing to the expenses of the Court. Option 3 provided that the Court's funds should include both assessed contributions by States parties and funds provided by the United Nations, but that during an initial phase, still to be determined, the expenses should be borne by the United Nations, subject to the approval of the General Assembly.

10. Article 105 dealt with voluntary contributions, which were to be utilized in accordance with criteria adopted by the States parties. With respect to article 105 ("Assessment of contributions"), a decision still had to be taken as to whether assessments should be based on the scale used for the regular budget of the United Nations or on a multi-unit class system like that used in the International Telecommunication Union (ITU) or the Universal Postal Union (UPU).

11. He suggested that informal discussions should be held on the question of financing.

12. **Mr. YAÑEZ-BARNUEVO** (Spain), introducing the amendment in document A/CONF.183/C.1/L.16, said that the proposal relating to article 102 was for the addition of a paragraph specifying that the official and working languages of the Assembly of States Parties should be those of the General Assembly, namely Arabic, Chinese, English, French, Russian and Spanish.

13. With regard to article 102, paragraph 1, he considered that the Assembly should be composed of States parties but that other States signatories either to the Statute or to the Final Act should participate as observers.

14. With regard to paragraph 2, he was in favour of the Assembly's considering recommendations of the preparatory commission and considering any question relating to non-cooperation by States parties.

15. As to paragraph 3 (a), the President of the Court, the Prosecutor and the Registrar should be able to participate as observers but not as members in the meetings of the Bureau; the judicial functions of the Court must be kept separate from political and administrative considerations and the functions of the Assembly of States Parties.

16. With regard to paragraph 5, for decisions of the Assembly the majority should be half of the States parties plus one, except for amendment of the Statute and similar matters.

17. It would be important to include paragraph 6 as an incentive for payment of contributions on time and in full.

18. The key article in Part 12 was article 104, and his delegation considered that the only option on which consensus could be reached was option 3.

19. With regard to article 106, the assessment of contributions should be based on the scale used for the regular budget of the United Nations. References should be made to the Assembly of States Parties in that article and in articles 103 and 105.

20. **Mr. SKIBSTED** (Denmark), speaking on Part 12 and in particular article 104 and its three options, said that his delegation considered that stable financing was essential for the Court to run effectively and smoothly. Financing of the Court should be a collective responsibility of all States, given the Court's universal nature and mandate. The establishment of the Court would be relatively expensive, and the financial burden of sharing in the costs should not be a disincentive to ratifying the Statute. The funding system should also reflect the Security Council's special responsibility for maintaining international peace and security. Expenses connected with the referral of situations to the Court by the Council should not be borne by States parties alone. Moreover, funding

by States parties might subject the Court to the control of a small number of States. Attempts to finance international bodies entirely from contributions by States parties had proved unworkable in the past. For instance, the work of the Committee against Torture and the Committee on the Elimination of Racial Discrimination had been paralysed because dues had not been paid, and human rights monitoring bodies were now financed from the regular budget of the United Nations. The International Court of Justice was funded collectively by all States through the regular budget of the United Nations, even though only some 50 Member States accepted the Court's compulsory jurisdiction; those States did not assume greater financial responsibility or greater budgetary control. Voluntary contributions should be encouraged, but only as additional funding.

21. Lastly, penalties for non-payment of contributions should be incorporated in the Statute.

22. **Mr. ABDELKADER MAHMUD** (Iraq), speaking on article 102, said that his delegation would like the last sentence of paragraph 1 to read as follows: "The signatories of the Statute or the Final Act may be observers in the Assembly."

23. With respect to paragraph 2 (e), his delegation was in favour of full-time judges; the reference to judges appointed on a part-time basis should be deleted.

24. With regard to paragraph 2 (f), his delegation considered that the Assembly of States Parties should be the sole body to consider non-cooperation by States parties or States not parties.

25. Regarding paragraph 3 (b), he considered that the Bureau should be elected on the basis of equitable geographical distribution; it was insufficient to say that equitable geographical distribution should be "taken into account".

26. Turning to Part 12, he said that his delegation preferred option 1 for article 104, with the funds of the Court comprising assessed contributions made by States parties.

27. **Mr. AL HOIESH** (Saudi Arabia) said that his delegation would prefer option 3 for article 104 and would like to keep the provision for voluntary contributions in article 105.

28. With respect to article 106, his delegation would prefer the Court's scale of assessment to be that of the regular budget of the United Nations.

29. **Mr. ASSHAIBANI** (Yemen) said that his delegation also preferred option 3 in article 104. With regard to article 106, his delegation would prefer the scale of assessment used for the regular budget of the United Nations.

30. **Ms. CHATOOR** (Trinidad and Tobago), speaking on behalf of the member States of the Caribbean Community, endorsed the remarks of the representative of Denmark with respect to article 104. She had no particular difficulty with article 105. With respect to article 106, her preference was for the scale used for the regular budget of the United Nations, but consideration might also be given to the creation of a separate account, as with the United Nations peacekeeping budget or the International Tribunals for the Former Yugoslavia and Rwanda.

31. With regard to article 107, the establishment of an independent auditor would need to be considered closely, since the United Nations system already had a well-developed oversight mechanism.

32. **Ms. SUNDBERG** (Sweden) endorsed the remarks of the representatives of Denmark and Trinidad and Tobago regarding the financing of the Court. Stable funding could be achieved only through assessed contributions borne collectively by all Member States of the United Nations. In cases of referral by the Security Council, in particular, Sweden would be unwilling to accept anything but collective financing by all United Nations Member States.

33. Only signatories to the Statute could be considered as members of the Assembly of States Parties. Sweden supported the establishment of a preparatory commission to work on the Rules of Procedure and Evidence and other questions outstanding from the present Conference. It also believed that the Assembly of States Parties should consider the budget; however, if it was agreed that the United Nations should finance the Court, the General Assembly would actually take the final decision on the budget. Sweden would like the Assembly of States Parties to consider non-cooperation by States parties and refer such matters to the Security Council, but its attitude was flexible and would depend on the outcome of the consultations on article 86. Sweden supported the inclusion of a provision on the loss of voting rights for countries in arrears.

34. **Mr. AL-AMERY** (Qatar) supported option 3 for article 104. His delegation would prefer to see article 105 deleted, in order to guarantee the independence and impartiality of the Court.

35. **Ms. MOKITIMI** (Lesotho) said that her delegation could accept article 102, paragraph 2, in general. It supported the removal of the square brackets around paragraph 2 (a), and considered that 2 (b) should be harmonized with the provisions in paragraph 1 of article 41 and paragraphs 1 and 2 of article 43 to ensure that management oversight by the Assembly of States Parties did not impede the independence of the judges and the Prosecutor. Paragraph 2 (f) needed to be strengthened to ensure that the Assembly was able to deal effectively with non-cooperative States. Paragraph 6 should ensure that all members paid their assessed contributions in full and on time by providing for the automatic suspension of a member in arrears.

36. On Part 12, she agreed that the United Nations regular budget would offer sounder financial backing, but feared that political manoeuvring might undermine the Court's independence. If that independence could be guaranteed, financing from the United Nations budget would be preferable. She was flexible about the idea of initial financing by the United Nations. She agreed that the Court should be able to receive contributions, financial or otherwise, from other sources. She considered that the United Nations scale should be used for assessments.

37. **Ms. FEDER** (Uruguay), referring to article 105, said that her delegation did not agree with the proposal to allow voluntary contributions to be used to finance the Court's activities. A problem had arisen in the United Nations as a result of the secondment or loaning of staff, which was a form of voluntary contribution. Voluntary contributions would be inappropriate for the Court, and article 105 should be deleted.

38. Her delegation favoured option 1 for article 104.

39. **Ms. BETANCOURT** (Venezuela) said that her country was a co-sponsor of draft resolution A/CONF.183/C.1/L.16 which proposed that the official and working languages of the Assembly of States Parties should be those of the United Nations General Assembly.

40. Regarding article 102, her delegation considered that only signatory States could be members of the Assembly of States Parties. Others could participate as observers. Her delegation also considered that it should be possible for the President of the Court, the Prosecutor and the Registrar to participate as observers in meetings of the Bureau of the Assembly.

41. With regard to article 104, her delegation considered that only States parties to the Statute should finance the expenditures of the Court. Her delegation was in favour of option 1. It also supported deletion of article 105, so as to guarantee the Court's impartiality. As to the scale of assessment of contributions, her delegation considered that the United Nations scale should be used.
42. **Mr. SCHEFFER** (United States of America), referring to the question of who should be observers in the Assembly of States Parties under article 102, paragraph 1, said that his delegation believed that all signatories to the Final Act should be invited as observers since all participants in the Conference were potential parties to the Statute.
43. With respect to paragraph 2 (a) he considered that, if the proposed preparatory commission was entrusted with drafting the Rules of Procedure and Evidence or "elements of offences", those texts should be completed and enter into force along with the Statute itself, in which case the Assembly would not need to adopt them.
44. The issue of the Assembly's role in handling cases of non-cooperation with the Court was being addressed in connection with Part 9 and did not need to be debated by the Committee at that stage.
45. His delegation agreed that flexibility was needed in respect of other functions to be performed by the Assembly since it was difficult at present to envisage precisely what they would be.
46. With regard to paragraph 5, he said that decisions should certainly be made by consensus as far as possible, failing which the requirement should be a two-thirds majority of those present and voting, representing an absolute majority of the States parties.
47. Under article 104, the Court should be funded by States parties to the Statute, as in the case of the Organization for the Prohibition of Chemical Weapons and the Comprehensive Nuclear-Test-Ban Treaty Organization. The future International Criminal Court resembled those organizations both in budgetary size and operational scope. It would be appropriate, however, for United Nations contributions to be made to cover part of the cost of referrals to the Court by the Security Council.
48. He welcomed the provision in article 105 for voluntary contributions, which would be essential if the Court was to respond effectively to all the demands that would be placed on it. He could not see on what legal basis the Court could be fully funded by the United Nations regular budget, even at the outset. The Court would be more independent and financially stable if it did not have to compete with other United Nations programmes as the International Tribunals for the Former Yugoslavia and Rwanda had had to.
49. On the question of scales of assessment in article 106, his delegation strongly preferred a multi-unit class system along the lines of that used by UPU or ITU.
50. **Mr. KAMAMURA** (Japan) said, with respect to article 102, paragraph 1, that his delegation believed that States parties should be represented in the Assembly of States Parties and that the signatories of the Statute and the Final Act should be observers since they were potential States parties. The precedent of the International Seabed Authority could be followed.
51. With regard to paragraph 2 (d), the Assembly should consider and approve the budget of the Court, but in consultation with the President of the Court.

52. Paragraph 2 (f) should be retained, and he agreed that there was a need to ensure consistency between that provision and article 86.
53. With respect to paragraph 6, in order to ensure consistency with the Charter of the United Nations, the wording should be "two full years".
54. Turning to article 104, he agreed with the representative of the United States concerning the funds of the Court and was in favour of option 1. As an independent international organization, the Court's administrative and financial independence had to be ensured. There was an appropriate precedent in the International Tribunal for the Law of the Sea.
55. With respect to article 106, a multi-unit class system on the lines of that used in ITU or UPU would be appropriate. However, the wording "in accordance with an agreed scale of assessment" would be sufficient.
56. He suggested that a ceiling on States parties' contributions might be considered at some stage.
57. **Mr. SKILLEN** (Australia) said that his delegation supported option 2 for article 104 for the reasons given by the delegation of Denmark.
58. **Mr. KROKHMAL** (Ukraine), referring to article 102, paragraph 1, said that it would be advisable for States not parties to the Statute to be given observer status. With respect to paragraph 2 (d), he believed that the Assembly of States Parties should have the right to rule on financial issues. With regard to paragraph 3 (b), he believed that elections to the Bureau should take account of the principle of equitable geographical distribution and that there should be a provision requiring representation of each geographical group.
59. With regard to paragraph 5, he believed that a two-thirds majority was desirable for decision-making. With regard to paragraph 6, he considered that a five-year period should be allowed for arrears.
60. Turning to article 104 on the funds of the Court, he believed that the Court should be financed by the contributions of States parties to ensure its independence.
61. Regarding article 106, he considered that the scale used for the regular budget of the United Nations was the most appropriate one.
62. **Mr. QU Wencheng** (China) said in connection with article 102, paragraph 1, that his delegation considered that the signatories of the Final Act should be observers in the Assembly of States Parties. It was important that the signatories of the Final Act should be able to participate in such activities as considering draft rules of procedure and evidence.
63. With respect to the financing of the Court, his delegation was in favour of option 1 in article 104. The future Court would be an independent body, unlike the International Court of Justice. If it was to remain independent, it should be funded by States parties.
64. With regard to article 105, his delegation considered that very strict criteria governing voluntary contributions would have to be drawn up to avoid their affecting the Court's impartiality. Any voluntary contributions would have to be complementary and additional to the main funding sources.

65. **Mr. BARTON** (Slovakia), referring to article 102, paragraph 1, said that his delegation considered that States parties should have the status of members of the Assembly of States Parties. Signatories should have the status of observers.
66. In article 104, for the reasons given by the representatives of Denmark, Sweden and others, his delegation supported option 2. With respect to article 106, his delegation considered that the scale of assessment should be that of the United Nations.
67. **Mr. AGBETOMEY** (Togo) said that his delegation would prefer option 3 for article 104, as a middle course.
68. In respect of article 102, paragraph 2 (f), his delegation would prefer the wording "appropriate measures". With regard to paragraph 3 (a), there should be at least two Vice-Presidents.
69. **Mr. ROGOV** (Kazakhstan), referring to article 102, said that his delegation considered that the signatory States of the Final Act should be observers in the Assembly of States Parties.
70. With regard to working languages, the working languages of the Court and the Assembly need not be the same; he thought that the working languages of the Assembly should be all the working languages of the United Nations.
71. With regard to article 104, his delegation considered that option 3 would be an acceptable compromise.
72. Concerning article 105, in his delegation's view the concern that voluntary contributions might influence the impartiality of the Court was unwarranted. Voluntary contributions might be useful.
73. **Mr. DA COSTA LOBO** (Portugal) said, in connection with article 102, that the representatives of States that had signed the Statute should be able to participate in the Assembly of States Parties as observers.
74. As to article 104, although it might be logical to provide for financing by States parties, in view of previous experience his delegation was inclined to support option 2. Even if another solution were adopted, at least during the early years the Court should be financed from the United Nations budget.
75. **Mr. BHATTARAI** (Nepal), referring to article 102, paragraph 1, said that his delegation considered that signatories of the Final Act should be observers in the Assembly of States Parties, but would prefer the wording to be "may participate as observers in the Assembly". Paragraph 2 (a) should stand. He endorsed the views of the Japanese representative that consideration and approval of the Court's budget should take place in consultation with the President of the Court.
76. Paragraph 2 (f) should be retained and the opening wording should be "consider, upon recommendation of the Court ...". In paragraph 3 (b), he was in favour of the words "have a representative character". In paragraph 3 (c), he favoured the wording "non-judicial administration". In paragraph 6, he favoured the wording "two full years".
77. **Mr. KESSEL** (Canada) said that his delegation supported the views expressed by the representatives of Denmark, Trinidad and Tobago and Sweden with respect to the funding of the Court.
78. **Mr. M'LU HONGO KABINDA-NGOY** (Democratic Republic of the Congo), referring to article 102, paragraph 1, said that States not parties to the Statute should be observers in the Assembly of States Parties.

79. With respect to paragraph 5, he said that, in the absence of consensus, an absolute majority of States parties should be able to take decisions.

80. In paragraph 6, he considered that a three-year period would be appropriate.

81. In article 104, he was in favour of option 3.

82. Voluntary contributions might jeopardize the Court's independence and he was therefore in favour of deleting article 105.

83. In connection with article 106, he believed that the scale of assessment used for the regular budget of the United Nations should be adopted.

84. **Mr. MANSOUR** (Tunisia) said that his delegation was in favour of option 3 for article 104. It wished article 105 to be deleted in order to guarantee the Court's independence and impartiality. It supported articles 106, 107 and 102.

85. **Mr. CHUKRI** (Syrian Arab Republic), referring to article 102, paragraph 1, said that his delegation considered that the signatories of the Statute (not the "Final Act") should be either observers or members in the Assembly of States Parties.

86. In paragraph 3 (b), he proposed that the words "as far as possible" should be deleted; representation of the principal legal systems of the world should be guaranteed. With respect to paragraph 6, he considered that a period of two full years was sufficient.

87. Turning to article 103, he thought that the words "by the States Parties" at the end should read "by the Assembly of States Parties".

88. In article 104, he preferred option 3. With regard to article 105, he was in principle against the idea of voluntary contributions, but would not oppose it if the wording of the article safeguarded their unconditionality. It would be for the Court to decide on the criteria for accepting or refusing such contributions.

89. With regard to article 106, he considered that the contributions of States parties should be based on the scale of assessment used for the regular budget of the United Nations.

90. **Mr. FALL** (Guinea), referring to article 102, paragraph 1, said that the signatories of the Statute would presumably be members of the Assembly of States Parties, and there would be advantages in the signatories of the Final Act being able to sit as observers.

91. In paragraph 2 (f), he would prefer the alternatives "of the Bureau" and "appropriate". With regard to paragraph 3 (a), he would like there to be more than one Vice-President. It would be for the Conference to determine the number of members of the Bureau to be elected on a basis of equitable geographical distribution. The President, the Prosecutor and the Registrar should be able to participate as observers in meetings of the Bureau.

92. In article 104, his preference was for option 2, subject to the approval of the General Assembly of the United Nations. Article 105 should be deleted. Lastly, he supported the Spanish proposal regarding official and working languages (A/CONF.183/C.1/L.16).

93. **Mr. OUMAR MAIGA** (Mali) said that his delegation agreed that, under article 102, paragraph 1, the signatories of the Statute should be able to participate as observers in the Assembly of States Parties, but was not in favour of the signatories of the Final Act participating in the Assembly.

94. Paragraph 2 (a) should be kept. He endorsed the comments made by the representative of Guinea concerning paragraph 2 (f). With respect to paragraph 3 (a), he agreed that the President of the Court, the Prosecutor and the Registrar or their representatives should be able, as appropriate, to participate as observers in the meetings of the Bureau. With regard to paragraph 3 (b), the Bureau should have a representative character taking into account equitable geographical distribution. With regard to paragraph 6, sanctions should be imposed after two full years.

95. In article 104, he was in favour of option 2. With regard to article 105, his delegation considered that voluntary contributions would in no way affect the Court's impartiality.

96. With regard to article 106, his delegation was in favour of the scale of contributions to the regular budget of the United Nations being used for the Court.

97. **Mr. BOCAR LY** (Senegal) said that, with regard to article 102, paragraph 1, the signatories of the Final Act should be observers. Paragraph 2 (a) should be kept. However, subparagraphs (b) and (e) of paragraph 2 gave rise to concern regarding the independence of the Court. In subparagraph (f), the words "upon recommendation of the Court" should be used. Any formulation used for paragraph 3 (a) should safeguard the Court's independence. In paragraph 5, a two-thirds majority of those present and voting should suffice. With respect to paragraph 6, he considered that the provision should be drafted to ensure that countries which for obvious economic reasons could not fulfil their obligations should be dealt with sympathetically, whereas those which did have the economic means to do so should be punished more severely.

98. With regard to article 103, he endorsed the point made by the representative of Syria concerning the final phrase. In article 104, option 2 should be chosen. Regarding article 105, voluntary contributions should be allowed. With respect to article 106, he would prefer the scale used for the regular budget of the United Nations.

99. **Mr. HAKWENYE** (Namibia), referring to article 102, paragraph 1, said that observers should be allowed to participate in the Assembly of States Parties.

100. With regard to paragraph 2 (d), he considered that the Assembly should consider and approve the budget for the Court in consultation with the Registrar, not with the President of the Court.

101. In article 104, he supported option 3. He was in favour of article 105 regarding voluntary contributions. With respect to article 106, he supported the view that the scale of assessments should be based on the United Nations regular budget.

102. **Ms. BLAIR** (United Kingdom) said, with regard to article 102, paragraph 1, she thought that the signatories of the Statute rather than those of the Final Act should be observers in the Assembly of States Parties. She supported inclusion of paragraph 2 (a). With respect to paragraph 3 (b), she favoured the wording "have a representative character" and the inclusion of the words "as far as possible". With regard to paragraph 5, she supported the requirement for a two-thirds majority of those present and voting for decision-making. With respect to paragraph 6, her delegation was in favour of the period in question being two full years.

103. Turning to article 104, she endorsed the comments made by the representative of Denmark.

104. With respect to article 106, she believed that assessments should be based on the scale used for the regular budget of the United Nations.

105. **Mr. Sayyid Said Hilal AL-BUSAIDY** (Oman), referring to article 102, paragraph 1, said that the signatories of the Final Act should be observers in the Assembly of States Parties. With respect to paragraph 3 (b), he supported the inclusion of a reference to equitable geographical distribution.

106. In article 104, he was in favour of option 3.

107. Article 105 should be retained, and he hoped that ways would be found to safeguard the independence of the Court.

108. With respect to article 106, he was in favour of contributions being assessed in accordance with the scale used for the regular budget of the United Nations. He also supported articles 103 and 107.

109. **Mr. AUKRUST** (Norway) favoured option 2 for article 104. Financing by the United Nations would ease the ratification process for a number of States, including less developed countries. Funding by States parties had already failed in the case of other treaty bodies.

110. **Mr. FORTUNA** (Mozambique), referring to article 102, paragraph 1, said that he supported the view that the signatory States of the Statute and Final Act should be observers in the Assembly of States Parties. With regard to paragraph 5, he was in favour of a two-thirds majority of those present and voting.

111. He supported option 3 for article 104 and was in favour of articles 105 and 106.

112. **Mr. Young-wook CHUN** (Republic of Korea) said, in connection with article 102, paragraph 1, that his delegation believed that signatories of the Final Act should be observers in the Assembly of States Parties. With regard to paragraph 3 (a), the President of the Court, the Prosecutor and the Registrar should be able to participate in meetings of the Bureau as observers. With respect to paragraph 5, he was in favour of a two-thirds majority of those present and voting.

113. In article 104, he supported option 3 as a compromise formula.

114. **Mr. NYASULU** (Malawi) supported the views expressed by the representatives of Denmark, Trinidad and Tobago and Sweden on article 104. Paragraph 6 of article 102 would lead to the exclusion of the least developed countries if option 1 was adopted for article 104. His delegation was in favour of option 3.

115. His delegation had supported the deletion of article 45, paragraph 4, and would recommend the deletion of article 105 unless it was reworded to preclude its covering the situations envisaged in article 45, paragraph 4, and article 43, paragraph 9.

116. Concerning article 106, his delegation would prefer the United Nations scale of assessments if option 3 was adopted for article 104.

117. With respect to article 102, paragraph 6, his delegation was in favour of the period of two full years. It also supported the proposal in document A/CONF.183/C.1/L.16 regarding official and working languages.

118. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said, with respect to article 102, paragraph 1, that she considered that the signatories of the Statute and the Final Act should be observers in the Assembly of States Parties.

119. With respect to paragraph 2 (f), she considered that the Assembly of States Parties should look into any question relating to non-cooperation by States parties and non-parties with the Court. The reference to the Security Council should be deleted.

120. With regard to paragraph 3 (a), she considered that the Registrar and the Prosecutor should be able to participate as observers in meetings of the Bureau. With regard to paragraph 3 (b), she stressed the importance of ensuring equitable geographical distribution and proposed the deletion of the words "as far as possible".

121. With regard to paragraph 6, she was in favour of a two-year period.

122. In article 104, her delegation was in favour of option 1. With regard to article 105, voluntary contributions should be looked upon as complementary contributions, but criteria to ensure the independence of the Court should be adopted. She endorsed the proposal in document A/CONF.183/C.1/L.16 concerning the Assembly's official and working languages.

123. **Mr. BAZEL** (Afghanistan) said that his delegation shared the views of the Danish representative concerning the options for article 104. It supported the idea of voluntary contributions in article 105.

124. **Mr. AMEHOU** (Benin) endorsed the views of the representative of Denmark regarding the financing of the Court.

125. **Mr. ADDO** (Ghana) said that article 102, paragraph 2 (f), should be dealt with only after article 86, paragraph 6, had been finalized. Article 102, paragraph 2 (e), would have financial implications, and the wording would be linked to the financial regulations of the Court. The remaining paragraphs of article 102 were satisfactory.

126. In article 104, Ghana's preference was for option 1, but paragraph 2 in option 3 could be kept. In article 106, his delegation favoured the wording: "The contributions of States Parties shall be assessed in accordance with an agreed scale of assessments based upon the scale used for the regular budget of the United Nations."

127. His delegation supported article 107.

128. **Mr. WELBERTS** (Germany) said that his delegation favoured option 3 for article 104 as a compromise between options 1 and 2. The Court needed stable funding but its authority might be compromised if it was dependent on the budget of the United Nations, which was facing difficulties because of unpaid contributions. Moreover, the mid-term priority planning of the United Nations did not allow for appropriate and continuous funding of the Court. It would therefore be better for States parties to be responsible for allocating resources to the Court.

129. The burden of sharing the cost of the Court should not be a disincentive to ratifying the treaty. There should be no obstacle to States with less capacity to pay becoming parties to the Statute or filing complaints with the Court.

130. Germany would be in favour of including in the Statute a penalty provision for defaulting and late contributors going beyond that set out in article 102, paragraph 6.

131. **Mr. AL HOSANI** (United Arab Emirates), referring to article 102, expressed the view that the signatories of the Statute and of the Final Act should be observers in the Assembly of States Parties. With regard to paragraph 3 (a), he considered that the President of the Court, the Prosecutor and the Registrar should be able to participate as observers in the meetings of the Bureau. With regard to paragraph 5, decisions on matters of substance should be taken by consensus or, failing that, approved by a two-thirds majority of those present and voting, representing an absolute majority of the States parties. With regard to paragraph 6, a State party should not have the right to vote if the amount of its arrears equalled or exceeded the amount of its contributions due for the preceding two full years. He endorsed the proposal in document A/CONF.183/C.1/L.16 regarding the official and working languages of the Assembly.

132. In article 104, he preferred option 3. Article 105 should be retained, due attention being paid to the independence of the Court on the basis of clear criteria to be adopted by the Assembly of States Parties.

133. Regarding article 106, contributions should be assessed in accordance with an agreed scale of assessment based on the scale used for the regular budget of the United Nations. At the end of the sentence, the words "after this is accepted by the Assembly of States Parties" should be added.

134. **Mr. MANYANG D'AWOL** (Sudan) said that his delegation would prefer option 3 for article 104 and would like the scale of contributions mentioned in article 106 to be that of the United Nations.

135. **Mr. MASUKU** (Swaziland) endorsed the views expressed by the delegations of Lesotho and Germany.

136. **Ms. VEGA** (Peru) said that, in article 102, paragraph 1, she supported the proposal that signatories of the Statute should be members of the Assembly of States Parties. In article 104, she supported option 1. With regard to article 106, the scale used in the United Nations was to be recommended.

137. **Mr. KAM** (Burkina Faso) said that his delegation was in favour of option 3 for article 104.

138. **Mr. RUPHIN** (Madagascar) said that he was in favour of option 3 for article 104. The independence of the Court would depend more on its procedures and its competence than on the sources of its funding. Funding for national courts came from the State and their independence was not jeopardized because of it. In article 105, concerning voluntary contributions, wording might be found to specify that any such funds would be complementary. With regard to article 106, he was in favour of the adoption of the scale used for the regular budget of the United Nations.

139. **Mr. MIKULKA** (Czech Republic) said that he preferred option 2 for article 104. The Court was intended to have a universal character and relations between the Court and the United Nations should be as close as possible. The Security Council would have certain functions under the Statute and the Court would be contributing towards maintaining international peace and security, which was one of the main objectives of the United Nations.

140. **Mr. GONZALEZ GALVEZ** (Mexico) thought that references to the Security Council, especially in article 102, paragraph 2 (f), should not be considered at present, since they were being looked at in connection with Part 9.

141. His delegation agreed that the Assembly should be able to allow a State to vote even though it had problems with its contributions, but thought that the last sentence in article 102, paragraph 6, might need amending. His delegation had proposed, in document A/CONF.183/C.1/L.14, the inclusion of a new paragraph in article 102, but

had now withdrawn that proposal because many delegations believed that to ask for an advisory opinion from the International Court of Justice on controversies between States parties and the Court would be inappropriate. His delegation maintained its proposal concerning article 108 in Part 13 of the draft Statute.

142. With regard to article 104, it was important to avoid placing yet another burden on the United Nations, and he therefore supported option 1. The only possibility for starting up the Court might be to provide for contributions by States parties and also a fund fed by voluntary contributions. However, article 105 might need to be amended.

143. He supported the view that it would be enough in article 106 to refer to "an agreed scale of assessment", without further specification.

144. Mr. WOUTERS (Belgium) said, with regard to Part 12, that his delegation saw much merit in a system of financing through the United Nations supplemented by a system of voluntary contributions. He endorsed the arguments put forward in favour of option 2 for article 104. The Conference should decide what should be the main source of financing for the Court, and not postpone that difficult choice.

145. At least in the initial phase, outside assistance for the Court might be helpful.

146. He was not convinced that it would be desirable to create further external auditing mechanisms in addition to those already existing in the United Nations. However, that issue might be clarified in informal consultations.

The meeting rose at 1.15 p.m.



**UNITED
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**United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court**

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 19th MEETING

**Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Monday, 29 June 1998, at 3 p.m.**

**Chairman: Mr. P. KIRSCH (Canada)
later: Mr. IVAN (Vice-Chairman) (Romania)
later: Mr. P. KIRSCH (Chairman) (Canada)**

CONTENTS

Agenda item	Paragraphs
11 Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (continued)	1-71

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99-81042 (E)





The meeting was called to order at 3.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.14/Rev.1 and L.24)

Part 13 of the draft Statute

1. **The CHAIRMAN** invited the Coordinator for Part 13 to introduce that Part of the draft Statute (A/CONF.183/2/Add.1).
2. **Mr. SLADE** (Samoa), Coordinator for Part 13, said that that Part contained the final clauses. With regard to article 108, there was no consensus in favour of any of the four options suggested in the draft. The effect of option 3 would be to make the Court judge of its own jurisdiction. Option 2, on the other hand, would not exclude the possibility of reference by the Assembly of States Parties of a dispute over the interpretation or application of the Statute to the International Court of Justice. Under option 4, there would be no provision on dispute settlement. There was a further proposal by Mexico in document A/CONF.183/C.1/L.14/Rev.1 to the effect that any dispute between States parties relating to the interpretation or application of the Statute not resolved through negotiation should be referred to the International Court of Justice. There were thus many policy issues to be resolved.
3. For article 109, there were also four options, all of which had their supporters. Further consultations were needed, and he suggested that discussion of the article be deferred.
4. Concerning article 110, which was closely linked to article 111, there was a general feeling that there should be a provision on amendments, but also that a period should be stipulated after which it would be possible to propose amendments. Some delegations considered that the review conference referred to in draft article 111 would be the appropriate body to consider such proposals. For paragraph 3, there were two options; in the case of option 2, it would need to be decided what kind of majority was required. In informal discussions, a proposal had also been made for a simplified procedure for dealing with amendments on matters described as being of an institutional nature.
5. Concerning article 111, there was the possibility of a merger with the preceding article. There were also two options: option 1 provided generally for the possibility of a special meeting of the Assembly of States Parties to review the Statute, while option 2 called more specifically for a meeting to review the list of crimes within the Court's jurisdiction. A final decision would depend on agreement on article 5.
6. Consultations were still needed to resolve the issues arising under article 112.
7. There had been a wide measure of support for inclusion of article 113, although some had favoured a more cautious approach. Questions had been raised as to whether the article was correctly placed within the Statute in view of its essentially political objective, and concern had been expressed that the article should fully and correctly reflect the 1969 Vienna Convention on the Law of Treaties.
8. Concerning article 114, there were two aspects which warranted further consideration. The first was the proposed link between entry into force of the Statute and completion of the Rules of Procedure and Evidence, an issue of substance which also had implications for negotiations under articles 52 and 53. The second was the idea

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that the deposit of instruments of ratification or acceptance by members of different geographical groups should be required. In his view, discussion of the article by the Committee at the present stage was unlikely to produce useful results, and he suggested that further consultations be held.

9. There had been no difficulty over paragraphs 1 and 2 of article 115, and general support had been expressed for inclusion of the bracketed text, perhaps with some redrafting. Lastly, no problems had been raised in regard to article 116, which he suggested could be referred to the Drafting Committee.

10. **Mr. CHUKRI** (Syrian Arab Republic) said he would prefer option 4 for article 108 because he believed that it was one of the fundamental responsibilities of the International Court of Justice to judge on disputes arising out of treaties. On article 109, he preferred option 4, under which there would be no article on reservations; article 19 of the Vienna Convention on the Law of Treaties already established the principle that reservations to a treaty were not permissible if they were incompatible with the purpose of the treaty.

11. Concerning article 110, he was flexible as to the period that should elapse before amendments were proposed, but considered a period of ten years reasonable. For paragraph 3, he preferred option 2, with requirement for a majority of either two thirds or three quarters of the States parties. Concerning article 111, he believed that review should be possible five to ten years after entry into force, and agreed that articles 110 and 111 could be combined. It was important that in article 112 the words "ratification", "acceptance", "approval" and "accession" be retained, since they were words used in the Vienna Convention. For article 114, the number of instruments required to be deposited could be 60 or 65. In article 115, he would prefer deletion of the bracketed text.

12. **Mr. PFIRTER** (Switzerland) said that for article 108 his delegation preferred option 3. He drew attention to a proposal by his delegation (A/CONF.183/C.1/L.24) for articles 110 and 111, which would soon be available in all languages and which was intended to provide a realistic solution to the problem of review of the Statute. His delegation was aware that a review against the wishes of some States parties was a delicate issue, but believed that it was not appropriate to give the right of veto to a single State party by requiring total consensus. A fact that also had to be taken into account was that some States which were Members of the United Nations did not have Governments which were in a position to act on their behalf by ratifying amendments to the Statute. Switzerland's proposal was that amendments should require a large majority, perhaps a five-sixths majority. The other essential element in the proposal was a simplified procedure for dealing with problems which were institutional in nature.

13. Concerning article 112, he saw no need for the bracketed words "without any kind of discrimination". He supported inclusion of article 113, as well as inclusion of the bracketed text in article 115.

14. **Mr. REBAGLIATI** (Argentina), referring to article 108, said it was important that some provision be made in the Statute for settlement of disputes. In his view the Court should be judge of its own jurisdiction, but disputes between States parties relating to other aspects of interpretation or application of the Statute should be settled by the classic mechanism of peaceful settlement through negotiation, conciliation, arbitration or, as a last resort, reference to the International Court of Justice. The Committee should be prudent in its approach and should seek a solution which was in line with existing international practice.

15. He agreed that articles 110 and 111 might be combined. For the latter, he preferred option 2.

16. While he respected the intention behind article 113, he feared that it might give rise to confusion. He did not think the first sentence was really necessary, but if it was to be retained he would like the wording to be brought into line with article 25 of the Vienna Convention on the Law of Treaties. The second sentence had a political objective, and he doubted whether it would be in conformity with the Vienna Convention to require States to

comply with the Statute's provisions before it had entered into force. If there was a majority in favour of inclusion of such a text, he believed that the proper place for it would be in the preamble.

17. **Mr. QUINTANA** (Colombia) said his delegation preferred option 2 of article 108, subject to drafting improvements. The Statute was bound to give rise to disputes among States parties, and it was essential that a mechanism for settling such disputes be provided, whether it was through a political body, as proposed in option 2, or a judicial body. The Committee should not lose sight of the fact that the Court it was creating would be judging individuals and not States, and in his view option 1 was quite unacceptable.

18. **Mr. GONZALEZ GALVEZ** (Mexico) agreed that articles 100 and 111 could be combined, but would prefer that article 113 be deleted.

19. **Mr. DIMOVSKI** (The former Yugoslav Republic of Macedonia) said that his delegation would be unable to sign the Convention if the bracketed text in the first line of article 112, paragraph 1, was not adopted. He would therefore appreciate the understanding of other delegations in that regard.

20. **Mr. AUKRUST** (Norway), referring to article 113, said that the French version of the title might suggest that what was proposed was the provisional application of the Statute. That notion should be dispelled. Rather, the article had been drafted in order to meet the concern that during the interim period before the Statute entered into force, there might be a need for international prosecution of perpetrators of crimes within the Court's jurisdiction, and that accordingly provision would have to be made for ensuring that the fact that the Statute had not yet entered into force should not be made a pretext for failure to initiate such prosecution. In his view, the Statute should give guidance on the principles to be followed in such cases.

21. The draft article sought to clarify how the principle contained in article 18 of the Vienna Convention on the Law of Treaties would apply in practice pending entry into force of the Statute. He was open to suggestions as to where the article should be placed in the text of the Statute.

22. **Mr. GEVORGIAN** (Russian Federation) favoured option 2 of article 108, which he thought covered all the situations provided for in options 1 and 3, as well as all the concerns expressed by delegations. The first sentence established that the Court was competent to decide questions relating to its judicial activities, and the second sentence provided for a flexible approach under which the Assembly of States Parties could make recommendations for further means of settling a dispute, which could include referral to the International Court of Justice. He supported those speakers who had favoured a merger of articles 110 and 111.

23. Although he supported the idea behind article 113, he considered it was more political than legal in nature and might thus have a more appropriate place in the Final Act of the Conference than in the Statute itself.

24. **Mr. AL-AMERY** (Qatar) said that concerning article 108 he supported option 4, for the reasons already advanced by the representative of Syria. Concerning article 110, he supported paragraph 1 with the inclusion of the bracketed words "the Secretary-General of the United Nations", and paragraph 2 with the words "meeting of the Assembly of States Parties". For paragraph 3, he supported option 2, with the wording "... shall require a three-quarters majority of all the States Parties". Lastly, he could accept paragraphs 4, 5 and 6 provided that paragraph 5 referred to "three quarters of all the States Parties".

25. **Mr. SCHEFFER** (United States of America) said that for article 108 his delegation favoured option 2. Article 110 was a critical article which needed to be carefully worded in order to ensure the continued viability of

the treaty. The States parties should not be in a hurry to revise the draft Statute; time should be allowed for the Court to begin operations, so that any revisions required could be made in the light of experience gained in implementing the Statute. Amendments should only be made at a review conference, and then only if they had the overwhelming support of States parties.

26. Regarding the signature of the Statute, the United States had requested that the dates should be placed in brackets in order to emphasize its view that the Rules of Procedure and Evidence and the elements of crimes should be an integral part of the Statute. Lastly, regarding article 113, he endorsed the views expressed by the representative of Norway. Justice ought not to stand still until the Court was established.

27. **Mr. SALAND** (Sweden) said that for article 108 he favoured option 3, since any disputes that arose were likely to concern judicial functions and should therefore be settled by the Court itself. However, he was also ready to consider option 2. He supported the Swiss proposal for articles 110 and 111. Concerning the latter article, he saw merit in including a provision whereby a review conference would take place automatically five to ten years after entry into force of the Statute, to deal with any unresolved issues and also with any deficiencies in the Statute that might have emerged.

28. Concerning article 112, his delegation's position was that the Statute should stand alone, and that any other instruments, for instance those governing rules of procedure and evidence, should be secondary and should not affect the opening of the Statute for signature or indeed its entry into force. He wished to make clear, however, that Sweden would not wish the Court to start operating before rules of procedure and evidence had been adopted. He strongly supported article 113, as well as retention of the bracketed third paragraph of article 115.

29. **Mr. AL-SA'AIDI** (Kuwait) said that for article 108 he preferred option 2, but also supported the Mexican proposal to refer to the International Court of Justice. For article 109 he favoured option 4. Regarding article 110, he suggested that the period of time specified in paragraph 1 should be ten years. For paragraph 3 he preferred option 2 with the requirement of a two-thirds majority of those present and voting. Paragraph 5 should require the deposit of instruments by two thirds of the States parties. Provision should be made in article 111 for review of the Statute after the expiry of a period of five to ten years. He favoured retention of article 113, and supported the Syrian proposal regarding article 114.

30. **Mr. LEHMANN** (Denmark) said Part 13 contained provisions which were standard in most treaties, and which he supported. In article 108 he would prefer option 3 in combination with a provision on settlement of disputes between States. Some article on reservations must be included. An article on amendments was also needed along the lines suggested in article 110. He supported articles 112 and 113.

31. Article 111 on review was not a clause normally included in treaties, but he believed that some provision should be made for adjusting the Statute on the basis of experience gained in order to ensure that it served the interests of justice, fairness and efficiency. The text as it stood was somewhat cumbersome, and his delegation had prepared a new draft combining the two options, which would be circulated.

32. **Mr. MANSOUR** (Tunisia) said his delegation favoured option 4 for article 108, and would propose ten years for the period to be specified in article 110, paragraph 1. He had no particular problem with articles 112, 113 and 115.

33. **Ms. PAVLIKOVSKA** (Ukraine) said she preferred option 1 for article 108, but would also be prepared to accept option 2. For article 109 she preferred option 2, with option B for paragraphs 1 and 2. She considered that

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article 113 could be deleted since its content was already covered by the corresponding provision in the Vienna Convention on the Law of Treaties. She would prefer paragraph 1 of article 114 to read: "This Statute shall enter into force following the completion of the Rules of Procedure and Evidence on the 60th day following ... provided that such instruments have been deposited by no fewer than four members from each geographical group ...". For article 115, she favoured retention of the bracketed third paragraph.

34. **Mr. MOLNAR** (Hungary) said that for article 108 his delegation preferred option 3, although it would be prepared to accept inclusion of elements of option 2. For paragraph 3 of article 110 he supported option 2; he was opposed to requiring that adoption of amendments should be by consensus. For article 111 he would prefer option 2, providing for automatic review of the list of crimes within the jurisdiction of the Court after a certain period of time, and would be prepared to discuss combining it with article 110. On article 112, his delegation considered that the Statute should be opened for signature following the successful conclusion of the Conference, and favoured inclusion of article 113 for the reasons advanced by the Norwegian delegation. Lastly, he supported article 115 with inclusion of the bracketed text.

35. **Ms. DASKALOPOULOU-LIVADA** (Greece) said she preferred option 3 for article 108, as she saw no need to set up an elaborate settlement procedure in regard to functions of the Court which were not judicial. The proposal by Switzerland regarding articles 110 and 111 was of considerable merit: she was inclined to favour an amendment procedure dispensing with the need for an automatic review after a certain number of years had elapsed. For article 110, paragraph 3, she favoured option 2 with a requirement for a three-quarters majority of those present and voting, but had reservations as to the bracketed language in the first line of article 112, paragraph 1, which was unclear and not in line with the standard language. She favoured article 113 in substance. She supported inclusion of the bracketed text in article 115, but perhaps it should be combined with paragraph 2.

36. **Ms. WILMSHURST** (United Kingdom) said that concerning article 108 she shared the view expressed by Syria that there should be no article on settlement of disputes. She was particularly puzzled by option 3, which she found odd in language and unnecessary in substance. On article 110, paragraph 2, she suggested that consideration might be given to a compromise wording whereby amendments to some parts of the Statute, for instance Part 4, could be considered at the Assembly of States Parties, and others could be considered at the proposed review conference. It would be in line with recent precedent for the adoption of amendments to require consensus and for their entry into force to require ratification by three quarters of the States parties. Concerning article 111, her delegation preferred option 1.

37. She noted that a number of delegations had expressed support for retention of the bracketed text in article 115, but pointed out that in fact that text was an alternative to paragraph 2 and could not just be added. Careful consideration would need to be given to how the article was to be drafted.

38. **Mr. YAÑEZ-BARNUEVO** (Spain), referring to article 108, said he did not think it appropriate to include a provision on settlement of disputes in the final clauses; perhaps it should be included in Part 2. At any rate, he agreed with previous speakers that there was room for a provision on settlement of disputes based on option 2.

39. He agreed that articles 110 and 111 should be considered jointly, although he was not sure they would have to be combined. Concerning the proposal by Switzerland, he thought that one would have to spell out clearly which provisions were deemed to be of an institutional nature, and thus subject to amendment through a simplified procedure. For article 110, paragraph 3, he would favour a combination of options 1 and 2 whereby, if consensus could not be reached on adoption of an amendment, such adoption should be by a three-quarters majority of States present and voting. While he recognized that the idea behind article 113 was a valid one, he did not think that the

text was appropriate for inclusion in the body of the Statute. Concerning article 115, he shared the views expressed by the representative of the United Kingdom.

40. *Mr. Ivan (Romania), Vice-Chairman, took the chair.*

41. **Mr. AREVALO** (Chile) said his delegation considered that some provision for the settlement of disputes should be included in the Statute, and would prefer option 2, which covered not only disputes concerning the judicial functions of the Court but also disputes between States parties regarding interpretation or application of the Statute. Concerning articles 110 and 111, any amendment or review of the Statute should only be proposed after the latter had been in force for at least five years, and a fairly large majority should be required for adoption of amendments. Article 113 as now drafted caused some difficulty for his delegation because it appeared to confuse two separate issues, the first the legal effects of signature of treaties subject to ratification, and the second the possible provisional application of the Statute. Those two issues were governed by separate articles of the Vienna Convention on the Law of Treaties, articles 18 and 25. In article 115, the provisions in the bracketed paragraph seemed to be covered by paragraph 2.

42. **Mr. ROGOV** (Kazakhstan) said that for article 108 he preferred option 2, and for article 110, paragraph 3, he preferred option 1. He supported the proposal that articles 100 and 111 be combined. He favoured retention of all the bracketed texts in article 112, and considered that the formulation contained in article 113 should be retained either in its present place or elsewhere in the Statute.

43. **Ms. TOMIČ** (Slovenia) favoured option 3 for article 108 and option 2 for article 110, paragraph 3. Provided paragraph 6 of article 110 was retained, there would be no need to provide for adoption by consensus, which would in effect mean that the veto of a single State party could block any amendment. She supported the simplified procedure for provisions of an institutional nature proposed by the delegation of Switzerland. Regarding article 111, she would favour a simplified provision for the convening of a review conference five years after entry into force of the Statute. Any amendments arising from such a review conference would be covered by the provisions of article 110. She favoured retention of article 113, which incorporated an important principle already enshrined in the Vienna Convention on the Law of Treaties, and fully supported the views expressed by the representative of Norway in that regard. Lastly, she was in favour of the bracketed paragraph in article 115, but agreed that it must be brought into line with paragraph 2.

44. **Mr. BARTON** (Slovakia) said that for article 108 he would prefer option 2, but thought that the words "the International Court of Justice" could be substituted for the words "the Assembly of States Parties". For article 110, paragraph 3, he was inclined to support option 1 but was prepared to accept the suggestion made by the delegation of Switzerland. He too favoured retention of paragraph 113, and in paragraph 115 supported inclusion of the bracketed text.

45. **Ms. BETANCOURT** (Venezuela) said that from the very beginning of the preparatory work her delegation had emphasized the need for an article on settlement of disputes. In article 108 she was in favour of option 2. She also preferred option 2 for article 110, paragraph 3, and article 111. For article 113, it would be preferable to follow the wording used in the Vienna Convention on the Law of Treaties.

46. **Mr. MOMTAZ** (Islamic Republic of Iran) said his delegation too favoured option 2 for article 108, with the possible inclusion of a reference to conflicts which might arise between the Court and States parties. Article 109 was of great importance, and he favoured the general regime for reservations as envisaged in the relevant provisions of the Vienna Convention on the Law of Treaties. The wording of article 113 should also be in line with the

wording of the Vienna Convention. Article 114 could refer to the deposit of the sixtieth or sixty-fifth instrument. He favoured retention of the bracketed text in article 115, and would like to reserve his delegation's position with regard to articles 110 and 111.

47. **Mr. HAMAD AL-SAAD** (Oman) said his delegation supported option 4 in both article 108 and article 109. For article 110, paragraph 3, he favoured option 2, and in paragraph 5 he would prefer "two thirds". For article 111, he favoured option 1 and was flexible regarding the period to be specified. Article 114, paragraph 1, should refer to the sixtieth day following the date of deposit of the instrument concerned and to four members from each geographical group. The bracketed text in article 115 should be retained.

48. **Mr. SIMPSON** (Australia) thought that disputes arising out of the Court's judicial function should come within the jurisdictional ambit of the Court itself. He also believed, however, that disputes of a more administrative nature could well be resolved by the Assembly of States Parties. Option 2 and option 3 for article 108 were therefore complementary. If option 2 was to be adopted, it might be useful to specify which disputes were to be characterized as "administrative" for the purposes of the article.

49. He was sympathetic to the idea of combining articles 110 and 111. In the former, he would prefer a threshold of two thirds of States parties for any amendment to the Statute, and would support deletion of paragraph 6, since the issue of withdrawal was well covered by article 115. Australia's position on article 111 was in line with that of the Danish delegation. It was vital that a review conference be held five years after entry into force. Generally speaking, a balance should be struck between binding States to amendments they might not support and preventing a small number of States from vetoing much-needed amendments.

50. He supported retention of article 112, and of article 115 with the bracketed text included. Lastly, he supported the views expressed by Norway in favour of retention of article 113, but would suggest that it include a reference to article 18 of the Vienna Convention on the Law of Treaties, and that in the title the words "objects and purposes" should be substituted for "principles and rules".

51. **Mr. DA COSTA LOBO** (Portugal) favoured inclusion of article 113. The bracketed text in article 115 contained important elements, but note should be taken of the comments made by the representative of the United Kingdom.

52. **Mr. KAWAMURA** (Japan) thought that, while it should be for the Court to decide on disputes concerning its own judicial functions, in the case of other disputes, for instance relating to administrative or budgetary questions, the Assembly of States Parties would be better able to resolve the issues. For article 108, therefore, he favoured option 2. Concerning article 110, paragraph 3, he would prefer option 2, since consensus on an amendment might be difficult to achieve, although a merger of the two options might be a good compromise solution. He noted that option 2 for article 111 provided for a simplified procedure for entry into force of amendments to the list of crimes within the jurisdiction of the Court contained in article 5. In his delegation's view, the list of crimes was a core part of the Statute, and the entry into force of amendments to it should be subject to the procedure provided for in article 110. He proposed that in the first sentence of paragraph 1 of option 2, the words "in order to consider additions to the list" should be deleted. Lastly, he could support the first sentence of article 113, but considered that the second sentence would be better placed in the preamble to the Statute.

53. **Mr. POLITI** (Italy) said his delegation too was prepared to accept option 2 for article 108. He considered that at the present stage articles 110 and 111 would be best kept separate. Concerning the former article, it was important that the adoption and entry into force of amendments should have the support of an adequate majority,

and he therefore favoured a reference to two thirds or three quarters of "all the States Parties", rather than of those present and voting. For article 111, he would prefer option 2.

54. Regarding article 112, the Italian Government was in fact proposing that the Statute should be opened for signature on 18 July 1998. He endorsed the comments made by Sweden regarding the signature and entry into force of the Statute. In regard to article 113, he supported the views expressed by the representative of Australia, and for article 115 supported inclusion of the bracketed text, though consistency with paragraph 2 must be ensured.

55. **Mr. P. S. RAO** (India) said that for article 108 he would prefer option 4. Since articles 110 and 111 served different purposes, they would be best kept separate. Procedures for amendment should be such that they attracted the widest possible consensus, and voting should be a last resort. For article 111, he preferred option 1. Any review carried out should consider not only additions to the list of crimes within the jurisdiction of the Court but also deletions from that list, as circumstances required. He had doubts as to the legal validity of the second sentence of article 113, and would prefer that the whole article be deleted.

56. **Mr. MAHMOOD** (Pakistan) said that for article 110, paragraph 3, he supported the idea that a three-quarters majority of all States parties should be required for adoption of amendments. For article 111, he favoured option 1 and the alternative "States Parties" rather than "those present and voting" in paragraph 1.

57. **Mr. ABDALLA AHMED** (Iraq) said that he preferred option 4 for article 108 and also for article 109. There would be good grounds for combining articles 110 and 111. In paragraph 3 of the former, he favoured option 2, and in paragraph 5 would prefer the figure "three quarters". For article 111, review of the Statute after the expiry of a five-year period from entry into force would be acceptable to his delegation. Lastly, he considered that article 113 could be deleted since the general principles it contained were already reflected in article 18 of the Vienna Convention on the Law of Treaties.

58. **Mr. BÜCHLI** (Netherlands), referring to article 108, said that he was flexible as to whether there was need to make separate provision for two types of dispute which might come before the Court. He was generally favourable to combining articles 110 and 111, but appreciated the argument that any review of the Statute was a major step, calling for a special procedure. Regarding what had been said by the representative of the former Yugoslav Republic of Macedonia on article 112, he thought that the final clauses of the Statute were not the place to debate political issues. It would probably be better to keep to the traditional wording.

59. He favoured retention of article 113 for the reasons outlined by the delegation of Norway: a mere reference to the Vienna Convention on the Law of Treaties would not be sufficient. He strongly urged delegations to consider the inclusion of such wording either there or elsewhere in the Statute. Regarding article 115, he would like to see elements of all three paragraphs incorporated in the text.

60. **Mr. GÜNEY** (Turkey), referring to article 108, said that while option 2 could accommodate his concerns he would prefer the Mexican proposal, which made provision for referral of disputes to the International Court of Justice. He urged that agreement on article 109 should be reached as soon as possible, since the subject of reservations was closely related to a number of substantive issues on which there were still differences of opinion. In regard to article 111, provision for automatic review was essential if the future treaty was to remain viable. His delegation had difficulty in supporting article 113 as now worded, and would prefer that the issue be covered by the relevant provisions of the Vienna Convention on the Law of Treaties. Lastly, he considered that the bracketed paragraph in article 115 was unnecessary and should be deleted.

61. *Mr. P. Kirsch (Canada) resumed the Chair.*

62. **Mr. NDJALANDJOKO** (Democratic Republic of the Congo) said that for article 108 he favoured option 2, which would cover both disputes relating to the internal activities of the Court and disputes between States parties. The text would not necessarily have to make reference to referral to the International Court of Justice. He could support the proposal that articles 110 and 111 be combined in a text which might perhaps be entitled "Modifications to the Statute".

63. His delegation found the overall content of article 112 acceptable, provided that the bracketed words "without any kind of discrimination" in the first line were deleted. He favoured deletion of article 113 for the reasons already advanced by previous speakers, and in article 115 would propose that paragraph 2 be replaced by the bracketed paragraph.

64. **Mr. AL HAFIZ** (Saudi Arabia) supported the view expressed by the representative of Syria that there should be no article on settlement of disputes; that issue was already covered by general principles of international law and more specifically by the Vienna Convention on the Law of Treaties. Nor should the Statute include any article on reservations. For article 110, paragraph 3, he would prefer option 2 with reference to a three-quarters majority, and he would favour a corresponding wording for paragraph 5.

65. **Ms. WYROZUMSKA** (Poland) said that for article 108 her delegation would prefer option 3, although in the light of concerns expressed by other delegations it would be ready to discuss option 2. Concerning article 10, paragraph 3, her delegation did not consider that consensus was the proper procedure for adoption of amendments, and she would therefore prefer option 2, with provision for a two-thirds majority. However, she saw some merit in the Swiss proposal. Concerning article 111, she believed provision for review of the Statute was necessary for the reasons outlined by Sweden, and would prefer option 2. Lastly, she shared the Swedish view that the Statute should stand on its own; the Rules of Procedure and Evidence should not necessarily have to be ratified, accepted or approved at the same time as the Statute itself. While she fully supported the intentions behind article 113, she agreed with Australia that its title should be reformulated.

66. **Mr. BOCAR LY** (Senegal) said that, with regard to article 108, he supported the position of the representative of Australia. For article 110, paragraph 3, he favoured option 2, but was waiting to see the French text of the Swiss proposal for articles 110 and 111, which he hoped would provide a solution. Concerning article 113, he could support the idea behind the second sentence, but considered that it might give rise to confusion and would be better redrafted and placed elsewhere in the Statute. Lastly, he could agree to the inclusion of the bracketed text in article 115, with some rewording of paragraph 2.

67. **Ms. RWAMO** (Burundi) favoured option 2 for article 108. She supported those delegations that had argued for the retention of article 113 on the grounds that it was vitally important not to allow crimes committed before the entry into force of the Statute to go unpunished. However, the wording of the last part of the second sentence might perhaps be improved.

68. **Mr. MIKULKA** (Czech Republic) said that for article 108 he preferred option 3, which contained all that needed to be said on the subject. Its purpose was to prevent a situation in which the Court might be paralysed by an artificial dispute which it was not competent to settle. He had no major problems with option 2, but thought that it should be stipulated that any recommendations made by the Assembly of States Parties should take due account of the obligations of the States involved under article 36 of the Statute of the International Court of Justice.

69. For article 110, paragraph 3, he had a preference for option 2. In that regard, whatever majority was required for adoption of amendments should be a majority of all States parties, not merely of States parties present and voting. He saw no reason why the article on amendments should not be combined with the article on review of the Statute. He was still not convinced of the usefulness of article 113: the first sentence was already covered by the law of treaties, and the second sentence might give rise to confusion because it did not constitute a legal obligation and did not make clear what was the goal of the action being requested of States. He saw no need for including such a provision in the final clauses, and believed that if a political message was intended it should more properly be placed in the preamble to the Statute.

70. **Mr. ONKELINX** (Belgium) said that, for article 108, option 1 was attractive, but it might be necessary to provide for other means of settlement for some disputes. He would support a merger of articles 110 and 111, and for paragraph 3 of article 110 would suggest that options 1 and 2 be combined. He endorsed the views expressed by Norway on article 113: its contents might duplicate articles 18 and 25 of the Vienna Convention on the Law of Treaties, but its inclusion could still be useful. In his view the provision was correctly placed where it was, but he would be glad to accept its being placed elsewhere if that would give it greater prominence.

71. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that for article 108 she preferred option 4; for article 110, paragraph 3, she preferred option 2. In article 111 she would favour option 1 with a requirement for a five-year period from entry into force; that would give ample time for the issues to be considered.

The meeting rose at 6.05 p.m.



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of Plenipotentiaries on the Establishment
of an International Criminal Court**

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 20th MEETING

**Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Tuesday, 30 June 1998, at 10 a.m.**

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

<i>Agenda item</i>		<i>Paragraphs</i>
11	Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (<i>continued</i>)	1-34
12	Adoption of a convention and other instruments deemed appropriate and of the final act of the Conference	34-56

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99-81048 (E)



The meeting was called to order at 10.20 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.14/Rev.1, L.22, L.24 and L.29)

Part 13 of the draft Statute (continued)

1. **Mr. QU Wencheng** (China) said that he preferred option 4 in article 108, "Settlement of disputes", but could agree to option 2. Amendments should preferably be made only five or ten years after the Statute entered into force. They should, as far as possible, be adopted by consensus but, failing that, by a vote. He preferred option 1 for the review conference, and agreed with what had been said by the representative of Japan at the previous meeting. Article 113 should be deleted since it might cause confusion, especially the second sentence.
2. **Mr. KOURULA** (Finland) preferred option 3 in article 108, but was prepared to discuss possible additions related, for example, to what the representative of Australia had referred to as "administrative" issues. He was in favour of article 111 ("Review of the Statute"), and welcomed the Danish proposal (A/CONF.183/C.1/L.29). Article 113 could be accepted, for the reasons given by the representative of Norway.
3. **Ms. MEKHEMAR** (Egypt) thought that there was no need for an article on the settlement of disputes, since there were general rules applicable. If such an article was included, the arbiter should be a third party and not the Court itself.
4. A period of five or ten years would be appropriate before the introduction of any amendments to the Statute. Proposed amendments should be considered by a review conference. Given the significance of the Statute, the preference should be for the adoption of amendments by consensus but, failing that, the required majority should be two thirds of the States parties. Articles 110 and 111 could be merged because they covered the same topic. The Swiss proposal for those articles (A/CONF.183/C.1/L.24), differentiating between different kinds of amendments, would need careful study. He agreed with the text of article 112 subject to the deletion of the bracketed words "without any kind of discrimination", which were out of place in such a provision. Article 113 was not needed. He supported the first two paragraphs of article 115 ("Withdrawal"), but the bracketed text was repetitive and should be deleted.
5. **Mr. KERMA** (Algeria) preferred option 4 in article 108, namely the option of having no article on dispute settlement in the Statute. In article 110, paragraph 1, he would favour a five-year period from the date of entry into force of the Statute before amendments could be proposed. In paragraph 3 he preferred option 2, with provision for the adoption of amendments by a two-thirds majority of the States present and voting. In article 111, he preferred option 2, with the deletion of the square brackets around the word "Five". That article was very important, since it would provide for a review of the list of crimes falling within the jurisdiction of the Court. He had reservations about article 113 as currently worded. He accepted articles 112, 115 and 116, including the paragraph in square brackets in article 115.
6. **Mr. KIDA** (Nigeria) preferred option 2 in article 108. He was flexible about the number of years to be specified in article 110, paragraph 1. In paragraph 3 of article 110, he favoured option 2, with a requirement for a two-thirds majority of all States, and he favoured the deletion of paragraph 6.

7. **Mr. JERMAN** (United Arab Emirates) preferred option 2 in article 108 because it seemed more comprehensive, while remaining sufficiently flexible. The period specified in article 110, paragraph 1, should be long enough to enable the proposed preparatory commission to establish the necessary rules and procedures. He preferred option 2 of paragraph 3, with the adoption of an amendment at a review conference by a two-thirds majority of all the States parties. In paragraph 5 the proportion of the States parties depositing ratifications or acceptances should be two thirds. He found articles 111 and 112 acceptable. Article 113 should be in line with the 1969 Vienna Convention on the Law of Treaties.

8. **Mr. WELBERTS** (Germany), referring to article 108, said that he was sensitive to the argument that no reference to settlement of disputes was needed. However, if there was such a reference, he would strongly favour option 3. Switzerland's proposal for article 110 should be given full consideration. In article 111, he favoured option 2. Concerning article 112, the Statute, in his view, stood by itself for the purpose of signature and ratification. Article 113 was very useful and should be kept. In article 115, the bracketed third paragraph should be kept.

9. **Ms. AGUIAR** (Dominican Republic) said that, if a provision on settlement of disputes were to be included, the Court itself should have the power to settle them. That principle was already enshrined in international law. She could envisage a merger of articles 110 and 111. A review of the Statute should take place after five years, to examine any difficulties encountered in its application and the possibility of amending the list of crimes in article 5. In article 110, paragraph 3, she preferred option 2, with a two-thirds majority of States present and voting. She supported option 2 for article 111. Article 113 should be retained as it stood. The purpose was to fill the void between the moment of signing the Statute and its entry into force.

10. **Mr. EFFENDI** (Indonesia) said that he supported the spirit and content of article 113, but thought that it might be possible to find an alternative way of achieving the purpose aimed at.

11. **Mr. HAFNER** (Austria) preferred option 3 in article 108, since option 2 might give rise to legal problems. If there was a general preference for option 2, he could accept it provided that the independence of the International Criminal Court was satisfactorily safeguarded. In article 110, he favoured option 2 of paragraph 3, perhaps prefaced by reference to a duty to try to achieve a consensus. In option 2, the majority should be a two-thirds or three-quarters majority of all the States parties, not only of those present and voting. In article 111, he particularly favoured option 2 because it drew a distinction between amendment and review mechanisms. The distinction related in particular to the effects of entry into force. Article 112 raised no problems, except that he saw no need for the words "without any kind of discrimination". He was very much in favour of the main thrust of article 113, which went beyond article 18 of the Vienna Convention on the Law of Treaties. He could accept article 115, though paragraph 2 and the bracketed paragraph could be merged.

12. **Mr. OUMAR MAIGA** (Mali) preferred option 2 in article 108, because it covered disputes between States parties as well as disputes relating to the Court's judicial activities. In article 110, he supported the first paragraph. In paragraph 3, he preferred option 2, with a two-thirds majority of States parties. He agreed with Australia that paragraph 6 could be deleted. In article 111, he preferred option 2, with provision for a five-year period. In article 112, the words "without any kind of discrimination" could perhaps be deleted. Article 113 could be deleted, because it was covered by the Vienna Convention on the Law of Treaties. The bracketed paragraph at the end of article 115 should become paragraph 2.

13. **Mr. DIMOVSKI** (The former Yugoslav Republic of Macedonia) said he wished to reiterate that, without the bracketed wording in the first line of article 112, paragraph 1, his delegation would not be able to sign the Convention. The effect of what had been proposed by some delegations would be to prevent his delegation from signing.

14. **Mr. NATHAN** (Israel) said that article 108 should provide for disputes between States to be dealt with initially by negotiation and, if negotiations failed, for the matter to be referred to the Assembly of States Parties. He therefore preferred option 2. He had no particular problem with the present draft of article 110, but preferred option 2, with a majority of three quarters of all the States parties. He preferred option 2 in article 111, but the convening of a review conference should perhaps be made subject to there being a minimum number of States interested in the convening of such a conference.

15. **Mr. ROBINSON** (Jamaica) thought that article 112 was not entirely consistent with United Nations practice, in that, under paragraph 2, the Statute was said to be subject to ratification, acceptance or approval by signatory States. It was enough to say that the Statute was subject to ratification, acceptance, approval or accession.

16. **Mr. GADYROV** (Azerbaijan) supported option 3 in article 108; all disputes should be settled by the Court itself.

17. In article 110, in principle, he favoured option 2, but he thought that the kind of majority should depend on the nature of the proposed amendments. For an amendment of a technical nature, a simple majority should be enough. If, however, the proposed amendment concerned issues fundamental to the concept of international criminal justice, or significant changes to the Statute and jurisdiction, a majority of two thirds or three quarters should be required.

Preamble to the draft Statute

18. **Mr. YAÑEZ-BARNUEVO** (Spain), introducing his delegation's proposal in document A/CONF.183/C.1/L.22, said that the draft preamble in document A/CONF.183/2/Add.1 was, in his view, insufficient. The first paragraph in his delegation's draft was new; it was intended to underscore the basic motive for the creation of the International Criminal Court—the fact that, throughout the present century, millions of people had been victims of grave crimes that affected humanity. It also reflected an idea that appeared in the Preamble to the United Nations Charter. The next two paragraphs were based on the first two paragraphs of the original draft. They stressed the collective wish of the States represented at the Conference to foster and improve international cooperation in bringing to justice those who perpetrated grave international crimes, and the determination to create an International Criminal Court as a permanent body within the United Nations system, with jurisdiction over the most serious crimes that affected the international community as a whole.

19. The next paragraph was based on the text suggested in footnote 2 in document A/CONF.183/2/Add.1. The fifth paragraph was new, but reflected language found in other similar conventions. It stressed two particular concerns found in the United Nations Charter, the maintenance of international peace and security and respect for universal human rights.

20. The final paragraphs were safeguard clauses. One was based on the fourth preambular paragraph of the definition of aggression annexed to General Assembly resolution 3314 (XXIX), and made it clear that the Statute should not be interpreted as in any way affecting the scope of the provisions of the Charter relating to the functions and powers of the organs of the United Nations. The last paragraph was based on the preambular paragraphs of certain conventions dealing with the codification and progressive development of international law, and stressed

that the Statute would not prevent general international law from continuing to govern those questions not expressly regulated in the Statute.

21. **Mr. NATHAN** (Israel) said that, although he would be quite happy with the existing text of the draft preamble, he had no major problem with the draft presented by the delegation of Spain. However, he had doubts about the proposed reference to a court "within the United Nations system", since what was proposed was that the Court should be an independent organ and not part of the United Nations system. He also thought that the sixth paragraph of the Spanish proposal was superfluous, because it was obvious that the Statute of the Court could have no impact on the provisions of the Charter of the United Nations.

22. In the third paragraph of the original draft and the fourth paragraph of the Spanish proposal, he would prefer the expression "criminal jurisdictions" to "criminal justice systems". The words "such a court is intended to be complementary" in the original draft should be replaced by the mandatory form "the Court shall be complementary".

23. **Ms. MEKHEMAR** (Egypt) said that the reference should be to "criminal jurisdictions", in line with the text of article 1 of the draft Statute.

24. **Mr. NYASULU** (Malawi) had no problems with paragraphs 1 and 2 of the text in document A/CONF.183/2/Add.1. He agreed that in the third paragraph the term should be "criminal jurisdictions". That paragraph, however, could be deleted, since it added little that was not contained in article 1. To replace the words "is intended to be complementary" by the words "shall be complementary" would be to move words from article 1 to the preamble. He would rather retain those words in article 1. He had no serious problems with the Spanish proposal in document A/CONF.183/C.1/L.22 except that it seemed to say the same as the present draft but at greater length. The fourth paragraph was unnecessary, but the second paragraph could perhaps take care of the point raised in the second sentence of article 113.

25. **Mr. MINOVES TRIQUELL** (Andorra) said that the preamble should briefly refer to the principles underlying the Statute, and it should also contain inspirational language and give the Statute a certain tone. The Spanish proposal, unlike the original draft, went a long way to meeting those objectives. He particularly supported the reference to the principles of the United Nations Charter.

26. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that she preferred the original draft of the preamble, but that the reference should be to complementarity to "criminal jurisdictions".

27. **Mr. AL-AMERY** (Qatar) supported the proposal to speak of "jurisdictions". He had no problems with regard to the first and second paragraphs.

28. **Mr. RINGERA** (Kenya) said that he preferred the original draft; the Spanish proposal was a little too wordy. He had no problem with the first two paragraphs of the original draft. For the third paragraph, however, he preferred the wording given in footnote 2 in the original draft.

29. **Mr. CHUKRI** (Syrian Arab Republic), supported by **Mr. MAHMOOD** (Pakistan), said that the wording of the third paragraph should be aligned with article 1.

30. **Mr. AGBETOMEY** (Togo) welcomed the Spanish proposal, which was more explicit than the original draft. However, certain expressions in the original draft, such as "crimes of concern to the international community",

were preferable to the Spanish wording. In the fourth paragraph of the Spanish draft, he would prefer the formula "shall be complementary to national criminal jurisdictions".

31. **Mr. Young-wook CHUN** (Republic of Korea) said that the present wording of the second and third paragraphs of the original draft was rather restrictive and did not reflect the noble purpose of the Statute. The Spanish proposal provided a good basis for a new draft, and he supported it.

32. **Mr. GEVORGIAN** (Russian Federation) said that he had no particular problems with the original text of the preamble, although he would prefer the formula proposed in the footnote for the third paragraph. He was also ready to support the Spanish proposal. He welcomed the third paragraph, and did not think that the independence of the International Criminal Court would be threatened by its being established within the United Nations system. The Court should function within the existing system of international relations. He supported the fifth paragraph, because the purposes and principles of the United Nations Charter concerning the maintenance of international peace and security and respect for human rights were directly connected with the activities of the future Court.

33. **Mr. GÜNEY** (Turkey) thought that it was somewhat premature to discuss the preamble before the operative part of the Statute had been completed. In principle, he had no problem with the original draft, although he would prefer the wording in the footnote for the third paragraph.

34. **Ms. WILLSON** (United States of America) said that, in general, she found the original draft of the preamble acceptable, but could support many elements of the Spanish proposal.

ADOPTION OF A CONVENTION AND OTHER INSTRUMENTS DEEMED APPROPRIATE AND OF THE FINAL ACT OF THE CONFERENCE (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.16)

35. **Mr. RAMA RAO** (India), speaking as Coordinator, introduced the draft Final Act, contained in part two of document A/CONF.183/2/Add.1. It was based on the usual form for final acts of conferences. The finalized Statute or convention would be inserted in the Final Act or annexed to it. In paragraph 14, the names of participating States would be inserted by the Secretariat from the list provided by the Credentials Committee. The Secretariat would also complete the blank spaces in paragraphs 15 to 19. The appropriate document numbers would be entered in paragraph 23. The square brackets in paragraph 24 related to the period during which the Statute would be open for signature, something that was still to be decided by the Conference.

36. In paragraph 26, there was a bracketed reference to a resolution on the establishment of a preparatory commission for the International Criminal Court. The brackets could perhaps now be removed.

37. He suggested that, subject to the necessary additions to which he had referred, the draft Final Act could be passed on to the Drafting Committee.

38. In the draft resolution in the annex, there were various issues to be decided regarding the establishment of the Preparatory Commission. There were several sets of square brackets in the draft, and three footnotes. One question concerned when the Commission should start its work. The main function of the Commission would be to make concrete proposals concerning arrangements for establishing the Court and bringing it into operation. Regarding paragraph 4 (d), it might be asked, since the Registrar would be responsible for proposing staff regulations under draft article 45, paragraph 3, of the Statute, what the function of the Commission would be in that connection. The suggestion was that the Commission should prepare a draft so that something would be available in advance.

39. A decision was also needed on whether the Commission would convene the Assembly of States Parties. Based on his consultations, he thought it might be appropriate for the Secretary-General rather than the Preparatory Commission to convene the Assembly of States Parties. He therefore proposed the deletion of the text in square brackets in paragraph 5.

40. **Mr. YAÑEZ-BARNUEVO** (Spain), referring to paragraphs 23 and 24 of the draft Final Act, expressed the view that the established term "Statute" rather than the term "Convention" should be used in the title of the instrument establishing the International Criminal Court. That would also help to avoid confusion with other Rome conventions.

41. In paragraph 26, the brackets around "Resolution on the Establishment of the Preparatory Commission for the International Criminal Court" should be removed. Turning to the annexed resolution, he said that, under paragraph 1 of the operative part, he would like to see the Preparatory Commission convened as soon as possible following the signature of the Statute and once the United Nations General Assembly had been able to take action as indicated in paragraphs 7 and 8. The Commission should be convened, at the initiative either of the General Assembly or of the Secretary-General, once a stated number of signatures was received, and the number did not need to be very high.

42. He wished also to draw attention to document A/CONF.183/C.1/L.16, containing a proposal, submitted by his delegation along with others, to amend the draft resolution by adding a paragraph 3 *bis* according to which the official and working languages of the Preparatory Commission would be those of the United Nations General Assembly. That would reflect the established practice for such preparatory commissions.

43. Finally, with regard to the tasks of the Preparatory Commission, he was not convinced that it should discuss elements of offences at that stage. He agreed with all the other tasks listed.

44. **Ms. WILLSON** (United States of America) said that paragraphs 1 to 23 of the draft Final Act presented no particular problems for her delegation. For the reasons already explained, the United States had requested the brackets contained in paragraph 24. Bearing in mind the need to pass articles on to the Drafting Committee, her delegation would accept the words in brackets in paragraph 24 of the Final Act and the corresponding words in brackets in article 112 of the draft Statute; however, it maintained its position that the Rules of Procedure and Evidence and the elements of offences were an integral part of the Statute and must be completed prior to its entry into force.

45. The brackets in paragraph 26 simply reflected the fact that there were still outstanding issues to be considered in the draft resolution concerned. They included the financing of the Preparatory Commission and the final preparation of the Rules of Procedure and Evidence.

46. The bracketed language in subparagraph (f) of operative paragraph 4 of the draft resolution should be deleted. Article 49 of the Statute would provide adequate privileges and immunities. Additionally, it was anticipated, as reflected in subparagraph (c), that the host country would conclude a headquarters agreement with the Court; that agreement should provide for the necessary privileges and immunities.

47. **Mr. BÜCHLI** (Netherlands) agreed that paragraph 4 (f) was redundant, as the general privileges and immunities of the Court would be covered by the Statute.

48. **Mr. KROKHMAL** (Ukraine) said that the dots at the end of paragraph 26 after the list of resolutions presumably meant that the list was not exhaustive. Some questions which were difficult to deal with within the framework of the Statute itself could perhaps be solved in the resolutions adopted by the Conference. The question of privileges and immunities was adequately dealt with in the draft Statute.

49. **Mr. AL ANSARI** (Kuwait) agreed that the term "Statute" should be used rather than "Convention". In paragraph 1 of the draft resolution, the wording should be "... as early as possible at a date to be decided by the General Assembly of the United Nations ...". Regarding the number of required signatures, 50 would be an acceptable figure, representing almost one third of the total number.

50. **Mr. GÜNEY** (Turkey) thought that paragraph 21 of the Final Act should refer to the draft originally prepared by the International Law Commission, and should read: "The Conference had before it a draft Convention on the Establishment of an International Criminal Court originally prepared by the International Law Commission and transmitted by the Preparatory Committee in accordance with its mandate."

51. **Mr. POLITI** (Italy) supported the removal of the brackets in paragraph 26. Referring to paragraph 24 and footnote 1 to the draft resolution, he reiterated his view that the Statute stood by itself and any secondary instrument, such as the Rules of Procedure and Evidence, should not affect the opening for signature or entry into force of the Statute.

52. On paragraph 1 of the draft resolution, he considered that the Preparatory Commission should be convened as soon as possible and that the number of signatures necessary to make paragraph 1 operative should not be very high. He supported the deletion of subparagraph (f). Finally, he agreed with the Coordinator regarding the deletion of the text in brackets in paragraph 5.

53. **Mr. KAWAMURA** (Japan), referring to paragraph 1 of the draft resolution, said that, as the Preparatory Commission's task was to propose practical arrangements for the establishment of the Court, it should be set up as soon as possible.

54. It might be appropriate to mention who was to draft the Rules of Procedure and Evidence, perhaps the United Nations Secretariat. He would support the deletion of subparagraph (d) of paragraph 4, because the staff regulations would be prepared by the Registrar as prescribed in paragraph 3 of article 45. Lastly, subparagraph (f) should be deleted, for the reason given by other speakers.

55. **Mr. GONZALEZ GALVEZ** (Mexico) had serious misgivings about the contents of the square brackets in paragraph 4 (a) of the draft resolution. It should be made clear that preparation of a text on elements of offences would take place at a later stage.

56. **Mr. MOMTAZ** (Islamic Republic of Iran) shared the views expressed by the representative of Turkey on the wording of paragraph 21 of the draft Final Act. In paragraph 23, he agreed that "Convention" should be replaced by "Statute". He was against deleting subparagraph (f) of paragraph 4 of the draft resolution, since article 49 of the draft Statute was not sufficiently explicit on privileges and immunities. He did not think it a good idea for the first meeting of the Commission to be convened by the Assembly of States Parties. A reference should also be made to the working languages of the Preparatory Commission.

The meeting rose at 12.40 p.m.



UNITED
NATIONS



United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.21
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 21st MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Tuesday, 30 June 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item

Paragraphs

- 11 Consideration of the question concerning the finalization and adoption
of a convention on the establishment of an international criminal court
in accordance with General Assembly resolutions 51/207 of
17 December 1996 and 52/160 of 15 December 1997 (*continued*)

1-4

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V.98-57474 (E)

99-81060 (E)



The meeting was called to order at 3.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1; A/CONF.183/C.1/WGPM/L.2/Add.1)

1. **The CHAIRMAN** invited the Chairman of the Working Group on Procedural Matters to introduce the addendum to the Working Group's report contained in document A/CONF.183/C.1/WGPM/L.2/Add.1, dealing with some articles of Parts 5 and 6.
2. **Ms. FERNANDEZ de GURMENDI** (Argentina), Chairman of the Working Group on Procedural Matters, said that, since the submission of its last report (A/CONF.183/C.1/WGPM/L.2), the Working Group had held seven additional meetings on outstanding issues. The Group was now transmitting to the Committee of the Whole the following provisions of Part 5 for consideration: article 54, paragraph 4, article 54 *ter*, paragraph 3 (d), article 58, paragraph 6, and article 61, paragraph 6 *bis*. It was also transmitting the following provisions of Part 6: article 62, paragraph 1, article 65 and article 69, paragraphs 2, 3, 4, 4 *bis*, 5, 6 and 8. The other articles would be transmitted later. The Working Group would continue to discuss the issues pending in Part 6 and would soon begin its examination of Part 8.
3. **The CHAIRMAN** asked whether he could take it that the Committee of the Whole agreed to refer the articles contained in the report of the Working Group to the Drafting Committee.
4. *It was so decided.*

The meeting rose at 3.20 p.m.



**UNITED
NATIONS**



**United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court**

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.22
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 22nd MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Thursday, 2 July 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item

Paragraphs

- 11 Consideration of the question concerning the finalization and adoption
of a convention on the establishment of an international criminal court
in accordance with General Assembly resolutions 51/207 of
17 December 1996 and 52/160 of 15 December 1997 (*continued*)

1-6

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V.98-57475 (E)

99-81066 (E)



The meeting was called to order at 3.20 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/WGIC/L.8 and Corr.1, L.10 and Corr.1, L.11 and Corr.1 and Corr.2)

Part 9 of the draft Statute

1. **The CHAIRMAN** invited the Coordinator for Part 9 to introduce the report of the Working Group on International Cooperation and Judicial Assistance.
2. **Mr. MOCHOKHOKO** (Lesotho), Coordinator for Part 9, introducing the report of the Working Group, said it was transmitting to the Committee for consideration article 85, article 86, paragraphs 1 to 4 and 6 to 7, articles 88, 89 and 90 *bis*, all paragraphs in article 91 with the exception of paragraph 4, and article 91 *bis*. The remaining articles would be transmitted at a later stage.
3. He wished to highlight a few points regarding certain of those articles. In article 88, paragraph 1 (a) (iii), a footnote should be added reading: "Some delegations have emphasized that they accept paragraph 1 (a) (iii) with the proviso that in article 87, paragraph 3, subparagraph (d) of option 2 will be deleted." In article 91 *bis*, the reference in the first sentence of paragraph 2 should be to paragraph 1. The understanding of the Working Group was that the text within square brackets in article 86, paragraph 7, would have to be reconsidered in the light of the decision on the question of referral of the matter to the Court by the Security Council. The terms that appeared in square brackets in articles 88 and 89 should be considered in the light of the use of those terms in article 87. Lastly, the terms enclosed in square brackets in article 91, paragraph 1, would have to be reconsidered in the light of the decision taken on the question of application of national law in Part 9.
4. **Ms. BOREK** (United States of America), referring to the footnote to article 88, paragraph 1 (a) (iii), pointed out that there had in fact been no agreement on the deletion of subparagraph (d) of option 2. She therefore proposed that, for the sake of clarity, a further sentence should be added to the footnote, to read: "This issue, however, is still under discussion in the Working Group."
5. **The CHAIRMAN** said he noted that the Coordinator for Part 9 was prepared to accept that amendment. If he heard no objection he would take it that the Committee wished to refer the articles concerned to the Drafting Committee.
6. *It was so decided.*

The meeting rose at 3.30 p.m.



**UNITED
NATIONS**



**United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court**

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.23
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 23rd MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Friday, 3 July 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item

Paragraphs

- 11 Consideration of the question concerning the finalization and adoption
of a convention on the establishment of an international criminal court
in accordance with General Assembly resolutions 51/207 of
17 December 1996 and 52/160 of 15 December 1997 (*continued*)

1-11

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V.98-57476 (E)

99-81072 (E)





The meeting was called to order at 3.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1)

Part 3 of the draft Statute

1. **The CHAIRMAN** invited the Coordinator for Part 3 to introduce the report of the Working Group on General Principles of Criminal Law (A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1).
2. **Mr. SALAND** (Sweden), Coordinator for Part 3, introducing the report, said that the entire text of subparagraph (c) of article 31, paragraph 1, should be deleted and replaced with the word "pending", and that in consequence footnotes 9, 10 and 11 should also be deleted. In article 23, the Working Group had decided to delete paragraph 7 (c), since a cross-reference to the issue of command responsibility was no longer needed. The agreement reached on article 25, which was a very difficult article, was a major breakthrough, and he was grateful for the flexibility shown by many delegations. The attention of the Drafting Committee was drawn to the need to review the title, and to the fact that the text represented a delicate compromise.
3. Following long and arduous discussions on article 28, it had become apparent that defining an omission and the circumstances in which it created individual criminal responsibility was an almost impossible task. The group had therefore reluctantly agreed to delete the article, and to leave the question to be resolved in other parts of the Statute. Footnote 3 indicated that some delegations had not been altogether happy with that decision.
4. There had also been a long and difficult discussion on article 30, but in the end a reasonably satisfactory result had been achieved. However, as was pointed out in footnote 5, some delegations had not considered that a mistake of fact or a mistake of law could be grounds for excluding criminal responsibility. While he respected that view, he believed that the text, which had been the subject of extensive negotiations, could now be referred to the Drafting Committee.
5. A considerable amount of time had been spent on article 31, which was central to the Statute, and he was pleased to say that agreement had been reached on the entire text with the exception of paragraph 1 (c), which was still pending. There had been a general understanding in the group that the text was the best result that could be achieved in the circumstances, and he again commended the flexibility shown by delegations. He drew attention to the various footnotes to the article. Footnote 7 indicated that the word "law" at the end of paragraph 1 (a) was intended to refer to applicable law as defined in article 20. Footnote 8 dealt with a very important issue to which the group had devoted many hours of discussion. It read: "It was the understanding that voluntary intoxication as a ground for excluding criminal responsibility would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes." Another important interpretative statement was contained in footnote 12, which indicated that cases of voluntary exposure were understood to be dealt with under paragraph 2 of article 31, which enabled the Court to disregard grounds for excluding criminal responsibility which would otherwise be applicable.
6. The Working Group had concluded that articles 33 and 34 could be deleted, since the issues they covered had been subsumed under article 31, paragraph 3.

/...

7. He proposed that the Committee should agree to transfer to the Drafting Committee the articles contained in the report, and agree to delete article 23, paragraph 7 (c), article 28, and articles 33 and 34.

8. **Mr. AVENDAÑO** (Mexico) said his delegation was not clear whether the footnotes referred to by the Coordinator were to be included in the final text of the Statute. If that was not to be the case, Mexico wished to insist that footnote 9 should be included in the text of article 31, paragraph 1 (c).

9. **Mr. SALAND** (Sweden), Coordinator for Part 3, said that as he had already explained, paragraph 1 (c) of article 31 was still pending, which meant that for the present the footnotes relating to it were deleted. The delegation of Mexico would have the opportunity to return to the issue at a later stage.

10. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee wished to refer the articles contained in the report of the Working Group to the Drafting Committee.

11. *It was so decided.*

The meeting rose at 3.30 p.m.



UNITED
NATIONS



**United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court**

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.24
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 24th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Monday, 6 July 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item

Paragraphs

- | | | |
|----|---|------|
| 11 | Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (<i>continued</i>) | 1-35 |
|----|---|------|

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V.98-57477 (E)

99-81084 (E) 080799



The meeting was called to order at 3.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.45 and Corr.1, L.47; A/CONF.183/C.1/WGGP/L.4/Add.2 and Corr.1; A/CONF.183/C.1/WGP/L.14 and Corr.1; A/CONF.183/C.1/WGPM/L.2/Add.2)

Parts 5, 6 and 8 of the draft Statute

1. **Ms. FERNANDEZ de GURMENDI** (Argentina), Coordinator of the Working Group on Procedural Matters, introducing the Group's report (A/CONF.183/C.1/WGPM/L.2/Add.2), said good progress had been made on the articles left pending. She listed the provisions of articles 54 *bis*, 61, 64, 66, 67, 74, 80 and 81 which were being submitted to the Committee for consideration, pointing out that subparagraph (c) of paragraph 1 of article 80 had been deleted. She drew the Committee's attention to the fact that in the title of article 80, the word "judgement" should be replaced by "decision", and a footnote added, reading: "The Working Group notes that the term 'decision' or 'sentence', as appropriate, should be used consistently throughout Part 8, rather than the term 'judgement'." The title of article 81 should read: "Appeal against other decisions".

2. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee wished to refer the provisions contained in the report of the Working Group, as orally amended, to the Drafting Committee.

3. *It was so decided.*

Part 3 of the draft Statute (continued)

4. **Mr. SALAND** (Sweden), Coordinator of the Working Group on General Principles of Criminal Law, introducing the Group's report (A/CONF.183/C.1/WGGP/L.4/Add.2 and Corr.1), said it would be seen from Corrigendum 1 that no text of paragraphs 5 and 6 of article 23 had yet been agreed. Paragraph 1 (c) of article 31, concerning self-defence as a ground for excluding criminal responsibility, was also still pending. However, he was pleased to say that article 32 had been adopted. He drew attention to footnote 8 (to become footnote 1 in the amended document), which explained the understanding which had enabled some delegations to go along with that decision.

5. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee agreed to refer article 32 to the Drafting Committee.

6. *It was so decided.*

Part 4 of the draft Statute

7. **Mr. RWELAMIRA** (South Africa), Coordinator of the Working Group on the Composition and Administration of the Court, introducing the Group's report (A/CONF.183/C.1/L.45 and Corr.1), pointed out that the text of paragraph 2 of article 40, presented therein, was in fact still pending. He drew attention to footnote 3 to article 43, paragraph 1, which indicated that the language ultimately adopted would reflect the outcome of

discussions on article 12. Concerning article 44, paragraph 4, he drew attention to footnote 8, which indicated that the language of the paragraph would have to be aligned with that of article 68, paragraph 5.

8. As could be seen from Corrigendum 1, article 45, paragraph 4, was in fact still pending. Other provisions that required further consultations before they could be submitted to the Committee for adoption were article 37, paragraphs 1, 3 (b), 4, 4 *bis* and 7; article 40, paragraph 1; article 49, paragraph 1; and article 52, paragraphs 1 and 3.

9. Ms. BAYKAL (Turkey), referring to article 45, paragraph 4, on gratis personnel, pointed out that footnote 9 did not reflect the view of her delegation, shared by a number of other delegations, that the bracketed paragraph should be deleted.

10. Mr. RWELAMIRA (South Africa), Coordinator, said it was because considerable support had also been expressed for the retention of that paragraph that it had been decided to leave it pending until further consultations had been held.

11. Ms. SHAHEN (Libyan Arab Jamahiriya), referring to the penultimate sentence of article 43, paragraph 2, said her delegation would have preferred the words "[and represent different legal systems]" to have been retained.

12. Mr. ROBINSON (Jamaica) drew attention to article 52, paragraph 4, which required that the Rules of Procedure and Evidence should be consistent with the Statute. During the informal consultations, his delegation had raised the question of whether such a provision would not invite challenges to the Court alleging *ultra vires*. As he understood it, the intention had been to indicate that in the event of a conflict between the Rules and the Statute, the Statute would prevail.

13. Mr. RWELAMIRA (South Africa), Coordinator, said it was his recollection that that point had been raised in connection with paragraph 1 of article 52. That provision too had been left pending, with a view to finding an acceptable formulation which would take care of Jamaica's concern.

14. Mr. PEREZ OTERMIN (Uruguay), referring to article 37 on the qualification of judges, noted that paragraph 3 (c) required every candidate to "possess an excellent knowledge of and be fluent in" at least one of the working languages. That seemed an unduly stringent requirement: he considered it would be sufficient to require "some knowledge" of one of the working languages.

15. Mr. RWELAMIRA (South Africa), Coordinator, said there had been general consensus that that requirement should be included. However, if the representative of Uruguay wished to pursue that point, it could be discussed by the Committee of the Whole. In response to the question raised by the representative of the Libyan Arab Jamahiriya, he explained that it had been felt that the most realistic solution would be to require that the Prosecutor and Deputy Prosecutors should be of different nationalities.

16. Mr. CHUKRI (Syrian Arab Republic) pointed out that nationalities and legal systems were not synonymous. He would prefer the wording "[and represent different legal systems]" to be retained.

17. The CHAIRMAN proposed that, in order to save time, the report of the Working Group, as orally amended, should be referred to the Drafting Committee with article 43, paragraph 2, left pending.

18. *It was so decided.*

Part 11 of the draft Statute (continued)

19. **Mr. RAMA RAO** (India), Coordinator for Part 11, introducing his report (A/CONF.183/C.1/L.47), said that it concerned only one article, article 102. Outlining the various decisions taken, he said that paragraph 3 (a) now provided for two vice-presidents of the Assembly instead of one. In paragraph 3 (b) the words "as far as possible" should be deleted. In paragraph 4, the first of the two bracketed phrases had been deleted and the second retained without the square brackets. For the third sentence of paragraph 5, a compromise solution had been reached whereby decisions on matters of substance had to be approved by a two-thirds majority of those present and voting, with a quorum of an absolute majority of States parties. It had been decided to delete the square brackets enclosing paragraph 6 as a whole, and to specify a period of two full years.
20. Paragraph 8, which had not existed in the earlier version, reflected a proposal by Spain concerning official languages, which had received general support in the informal consultations.
21. **Mr. YAÑEZ-BARNUEVO** (Spain) said his delegation did not object to the referral of article 102 to the Drafting Committee, but would appreciate clarification concerning paragraph 5. Did the formula chosen imply that the two-thirds majority of those present and voting had also to constitute an absolute majority of States parties? He also wished to know whether the words "except as otherwise provided in the Statute" referred back to the particular issue of the quorum for voting, or, as was his understanding, to the broader issue of adoption of decisions on matters of substance.
22. **Mr. RAMA RAO** (India), Coordinator, said that the understanding of the representative of Spain was correct regarding the second point.
23. **Mr. van BOVEN** (Netherlands), noting that a footnote had been added to paragraph 2 (d) to the effect that the paragraph was without prejudice to the final decision on article 104, said that a footnote to the same effect should perhaps be added to paragraph 6.
24. **Mr. CHUKRI** (Syrian Arab Republic) noted that no mention was made in paragraph 5 of the majority required for approval of decisions on non-substantive or procedural matters. That issue should also be addressed.
25. **Mr. PFIRTER** (Switzerland) endorsed the views expressed by Spain regarding the need for clarification of paragraph 5. It should be made clear whether the quorum specified was a quorum for adoption of decisions on matters of substance, or simply one required for proceeding to a vote.
26. **Mr. BOUGUETAIA** (Algeria) said that since paragraph 5 dealt with the fundamental issue of the procedure for making decisions on substantive matters, it was important to be precise, and that he therefore fully endorsed the requests for clarification just made. Did the provision require a two-thirds majority of the absolute majority specified in the proviso?
27. **Mr. KROKHMAL** (Ukraine) supported the views expressed by the representative of Spain concerning paragraph 5, and by the representative of the Netherlands concerning paragraph 6.
28. **Mr. RAMA RAO** (India), Coordinator, in reply to the point raised by the representative of the Netherlands, said it had been decided to add the footnote to paragraph 2 (d) in order not to prejudge the question of what kind of funding mechanism for the Court might eventually evolve under article 104. However, the issue dealt with in paragraph 6, namely the voting rights of States parties in arrears in the payment of financial contributions, was unrelated to the one dealt with in paragraph 2 (d), and there was therefore no need to add any reference to article 104.

29. In reply to the question raised by the representative of the Syrian Arab Republic concerning paragraph 5, he said that the issue of the procedure to be followed in taking decisions on non-substantive matters had not been addressed. In response to the concerns expressed regarding the formulation of the third sentence of paragraph 5, he said that the two kinds of majority referred to should be seen as an integral whole, reflecting a compromise solution to the question of the required majority for voting. He suggested that the meaning of the text would perhaps be clarified if the words "except as otherwise provided in the Statute" were placed after the words "if consensus cannot be reached". It could be left to the Drafting Committee to clarify any remaining ambiguities.

30. Ms. AGUIAR (Dominican Republic), speaking as a member of the Drafting Committee, pointed out that it was not the task of that Committee to divine the intentions underlying the articles of the Statute, but rather to clarify the language in which they were expressed. That task was extremely difficult in the case of paragraph 5, which dealt with at least four separate concepts: voting rules, rules on decision-making, majorities, and quorums. A quorum was normally required for the holding of a meeting, not for proceeding to a vote. If that confusion could be clarified, the task of the Drafting Committee would be a great deal easier.

31. The CHAIRMAN proposed that paragraph 5 of article 102 should be left pending, and that the remainder of the article, as orally amended, should be referred to the Drafting Committee.

32. *It was so decided.*

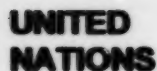
Part 7 of the draft Statute

33. Mr. FIFE (Norway), Coordinator of the Working Group on Penalties, introducing the Group's report (A/CONF.183/C.1/WGP/L.14 and Corr.1), said that the Group was now in a position to transmit to the Committee for consideration article 75, paragraph 2; article 77, paragraphs 1 and 2; and article 79. A reference to an article 21 *bis* had been included in the text because, although some had felt that the principle of *nullum crimen sine lege* might usefully be considered in the Working Group, others had been of the view that that issue really belonged in Part 3 of the Statute. Two minor amendments should be made to the text of the report: it had been agreed in the informal consultations that the term "forfeiture" should be used in a consistent manner throughout the Statute, and not simply in Part 7, as erroneously stated in footnote 1; and in footnote 3 the word "possible" should read "impossible".

34. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed to refer the articles contained in the report of the Working Group, as orally amended, to the Drafting Committee.

35. *It was so decided.*

The meeting rose at 4.35 p.m.



United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.25
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 25th MEETING

**Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Wednesday, 8 July 1998, at 10 a.m.**

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

<i>Agenda item</i>	<i>Paragraphs</i>
11 Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1997 (<i>continued</i>)	1-80
Message from the Secretary-General	81

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The meeting was called to order at 10.25 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.53)

Part 2 of the draft Statute (continued)

Discussion paper prepared by the Bureau

1. **The CHAIRMAN** drew delegations' attention to a discussion paper (A/CONF.183/C.1/L.53), prepared by the Bureau to facilitate the Committee's consideration of Part 2.
2. He proposed that the debate should be divided into two parts, the first bearing on crimes (article 5), and the second on other jurisdictional issues, admissibility and applicable law. It would be particularly useful if delegations would comment on the following issues: (i) an approach to the crime of aggression that might form the basis of general agreement; (ii) an approach to the treaty crimes, namely terrorism, drug trafficking and crimes against United Nations and associated personnel; (iii) the need for a threshold for war crimes; (iv) a generally acceptable approach to weapons of a nature to cause superfluous injury or unnecessary suffering; (v) sections C and D on armed conflict not of an international character, including the need for those sections and, if they were included, the threshold for those provisions; (vi) the need for an appropriate provision on elements of crimes to be elaborated after the Rome Conference.
3. On other jurisdictional issues, admissibility and applicable law (articles 6 to 20), the Bureau would appreciate comments on the following: (i) acceptance of jurisdiction—automatic jurisdiction, opt-in or State consent for one or more core crimes; (ii) which States should be parties to the Statute or have accepted jurisdiction before the Court exercised such jurisdiction; (iii) the *proprio motu* power of the Prosecutor to initiate proceedings and the safeguards that would be required; (iv) the role of the Security Council on issues other than aggression. Delegations were of course free to comment on any other issues relating to Part 2.

Article 5

4. **Mr. van HEBEL** (Netherlands), Coordinator, said that the first major issue in connection with article 5 was whether the crime of aggression should be included within the jurisdiction of the Court. If no general agreement could be secured on the definition of that crime, there was an option to exclude it. The second issue was the inclusion of treaty crimes. With regard to genocide and crimes against humanity, the definition of the former had caused no problems and was indeed exactly the same as the one in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. With regard to crimes against humanity, a compromise text had now received wide support. On war crimes, there were three options relating to the thresholds. Option 1 provided that the Court should have jurisdiction over war crimes only when committed as part of a plan or policy, or as part of a large-scale commission of such crimes. Option 2 was almost the same but with the word "only" replaced by "in particular". Option 3 was for no such provision to be included. In earlier discussions, option 2 had been favoured by most delegations as a compromise solution.
5. The definition of war crimes consisted of four sections, A to D. Section A, grave breaches of the Geneva Conventions of 1949, had not caused serious problems. There were a few outstanding issues requiring clarification

in section B, dealing with other serious violations of the laws and customs applicable in international armed conflict. In paragraph (o), dealing with weapons, there were three options, the first providing for a short list of weapons of a nature to cause superfluous injury or unnecessary suffering, with a provision (subparagraph (vi)) to allow further expansion of the list in the future in accordance with a procedure to be laid down. Further consultation might be held on the wording of that provision. Option 2 contained the same list plus three other elements: nuclear weapons, anti-personnel mines and blinding laser weapons. Subparagraph (ix) of that option provided for the possibility of further expansion of the list.

6. Option 3 took a different approach, since it did not give a list of weapons but simply stated that certain weapons should be considered prohibited. Paragraphs (p *bis*) (crimes of a sexual nature), (r *bis*) (United Nations personnel) and (t) (participation of children) were still under discussion. Sections C and D were open for further discussion and for each there was an option 2 providing that there would be no such section.

7. Lastly, following article Y there was a comment that read: "Elements of crimes may be elaborated after the Rome Conference by the Preparatory Commission", which had received considerable support. The drafting was subject to further discussion.

8. Mr. RWELAMIRA (South Africa), speaking on behalf of the countries of the Southern African Development Community (SADC) on article 5, said that the SADC countries supported the inclusion of the crimes enumerated in (a), (b) and (c) under "Crimes within the jurisdiction of the Court". They also supported inclusion of the crime of aggression, subject to agreement on a definition and a clear spelling out of the Security Council's role. They had no problem with inclusion of the crime of genocide or the definition thereof, and supported the present formulation of the provisions on crimes against humanity and the wording of the *chapeau* to those provisions.

9. With regard to war crimes, option 1 set too high a threshold; the SADC countries therefore supported option 2. With regard to paragraph (o), in the interests of compromise they would be prepared to support option 1 on the understanding that it included subparagraph (vi), which allowed for the possibility of including other weapons at a later stage.

10. Most atrocities were now committed in the context of internal armed conflicts. SADC therefore supported inclusion of sections C and D in the Statute, although a compromise provision containing elements of both sections might also be acceptable.

11. With regard to the crime of aggression, option 1 provided a good starting point for an acceptable definition, but it should also take account of contemporary forms of aggression, particularly the elements set out in General Assembly resolution 3314 (XXIX).

12. The SADC countries had a flexible attitude with regard to the inclusion of treaty crimes: drug crimes and crimes against United Nations personnel represented major challenges and might usefully be reflected in the Statute. While attracted to the idea of including the elements of crimes, they wished to know whether the elements would form an integral part of the Statute, whether they would be elaborated in the Preparatory Commission, and what would be the influence of States in that process.

13. Mr. HAFNER (Austria), speaking on behalf of the member States of the European Union, said that the European Union considered that the Court should be an independent institution with jurisdiction over the core crimes of genocide, crimes against humanity and war crimes. Aggression should also come within the Court's jurisdiction if properly defined.

14. The European Union considered that as internal conflict was now so widespread, the Court's jurisdiction should extend to crimes committed in internal as well as international armed conflict. Moreover, the Court should be complementary to national processes when national systems were unable or unwilling to investigate or prosecute. The Security Council should be able to refer to the Court situations in which crimes within the Court's jurisdiction might be committed.

15. Mr. MACKAY (New Zealand) said that his delegation wished the crime of aggression to be included under the Court's jurisdiction, but that in view of the difficulties of definition it might be necessary to maintain the status quo, whereby aggression was ultimately determined by the Security Council.

16. New Zealand was in favour of the inclusion of treaty crimes, but, because of its complexity, that question might have to be left to the review conference provided for in the Statute. There was no need for a threshold for war crimes since international law was already clear and any threshold adopted might limit the existing rules. Option 1 was unacceptable to his delegation because its *chapeau* would rule out application of the Statute to situations in which it was desirable that it should apply. In view of the concerns expressed by other delegations, option 2 was probably the best way forward, although not the one preferred by his own delegation.

17. With regard to the approach to weapons of a nature to cause superfluous injury, New Zealand supported option 3, which had the merit of avoiding a precise listing and had stood the test of time. His delegation also proposed that the reference to "bullets which expand or flatten easily", in subparagraph (iii) of options 1 and 2, should be amended to read "bullets which expand, explode or flatten easily".

18. He again drew the Committee's attention to New Zealand's proposal, contained in document A/CONF.183/C.1/L.40, to delete the word "overall" from paragraph (b) of section B, an issue which he hoped would be taken up at a later stage.

19. As to whether armed conflicts not of an international character should be covered by the Statute, failure to include such conflicts would leave a huge gap that would be quite unacceptable to the international community. However, further discussion was needed with delegations that were concerned about the application of that provision.

20. His delegation was not entirely convinced of the need for including elements of crimes, but did not rule out that possibility, provided it did not delay the entry into force of the Statute.

21. Mr. ONKELINX (Belgium) said that his delegation hoped that the crime of aggression would be included within the jurisdiction of the Court. Belgium was in favour of option 1, but would like military occupation and annexation of territory not to be the only objectives referred to in the definition of aggression.

22. While his delegation was greatly interested in including treaty crimes, that was a complex issue on which it would be very difficult to reach a conclusion at the present Conference. The matter might be reflected in the Final Act in the hope that it could be included in a subsequent revision of the Statute. His delegation did not consider that terrorism and economic embargoes had a place among crimes against humanity as currently defined in international law.

23. With regard to the threshold for war crimes, Belgium had always favoured option 3, but with a view to achieving a compromise would be prepared to accept option 2. With regard to weapons, his delegation's preference was for option 3 because it was the one most consistent with the texts of humanitarian law conventions. However,

if there was a large majority in favour of specifically enumerating prohibited weapons, it could accept option 1 provided the whole of option 3, and in particular the words "inherently indiscriminate", were included in the *chapeau*.

24. With regard to sections C and D, Belgium, like all the member States of the European Union, was firmly in favour of the recognition of the Court's jurisdiction over war crimes committed in armed conflicts not of an international character.

25. Article Y should also be reflected in the Statute. However, further discussion was needed with regard to elements of crimes.

26. Mr. OWADA (Japan) stressed the need for flexibility in order to achieve consensus. The Statute had to be drafted so as to provide satisfactory coordination between existing national judicial systems and the Court's international mechanism. A strictly purist approach would merely produce an unworkable Statute.

27. On crimes against humanity, his delegation had been in favour of the words "widespread and systematic attack" in the *chapeau* of paragraph 1, but since many delegations preferred "widespread or systematic attack", as in the 1995 Code of Crimes against the Peace and Security of Mankind, and since paragraph 2 provided some clarification, his delegation would adopt a flexible attitude on that point. Japan supported the inclusion of paragraph (g) on rape or other crimes of sexual violence, and hoped that the matter would be satisfactorily resolved. His delegation was not in favour of including terrorism and economic embargoes under crimes against humanity.

28. With regard to war crimes, his delegation considered that a threshold was important, since crimes under the Court's jurisdiction had to be distinguished from more general categories of crime. His delegation was therefore in favour of option 1, but would be prepared to consider option 2 if the majority so desired.

29. With regard to weapons (paragraph (o)), he said that in accordance with the principle of *nullum crimen sine lege* it was important to enumerate the acts to be considered as war crimes and their constituent elements. The approaches in options 1 and 2 were therefore preferable to the more generic approach adopted in option 3.

30. Since international law on the subject was still in the process of development, Japan was in favour of including provision for a review, as in option 1, subparagraph (vi), and option 2, subparagraph (ix). Any such review would, however, have to be carried out in accordance with the procedures laid down for the revision of the Statute.

31. His delegation was in favour of including paragraphs (p *bis*), (r *bis*) and (t), and urged the Conference to find appropriate wording for those provisions. Japan was also in favour of including sections C and D so that the Statute would apply to armed conflicts not of an international character. It favoured including the crime of aggression on two conditions: first, that a clear definition of the crime was established, and secondly, that there would be no infringement of the Security Council's prerogative under Article 39 of the Charter.

32. On the question of treaty crimes, his delegation considered that, while crimes related to drugs and terrorism were extremely serious, it was essential to intensify cooperation within the framework of the treaties dealing with those issues. If treaty crimes were included within the Court's jurisdiction, they should all be treated on an equal footing. Moreover, if the treaty crimes were assigned to the jurisdiction of the Court, there was a danger that it might become overburdened. Lastly, Japan considered it absolutely essential to include a binding provision on

elements of crimes as an integral part of the Statute; however, work on that issue could continue after the Conference.

33. Mr. SADI (Jordan) said that his delegation was in favour of including the crime of aggression in the Statute. It maintained an open mind on the issue of treaty crimes. However, it wished to insist that armed conflicts not of an international character should be included. It favoured option 2 with regard to the threshold for war crimes, and preferred option 2 with respect to weaponry, although it was also prepared to entertain option 1. His delegation maintained an open mind on the question of including the elements of crimes.

34. Mr. LIU Daqun (China) said his delegation considered that if agreement could be reached on the definition and on the role of the Security Council in that context, the crime of aggression should be included in the Court's jurisdiction. It could not agree to a selective approach to treaty crimes, which should either all be included or all omitted. His delegation also had some concerns about the provisions concerning crimes against humanity, but was prepared to accept the compromise proposal of Canada.

35. With regard to war crimes his delegation favoured option 1 for the *chapeau*. It was also in favour of option 1 for paragraph (o) under section B. However, it still needed more time to study subparagraph (vi). With regard to paragraph (r bis), protection of United Nations personnel, his delegation considered that that matter could not be assimilated to a war crime. Moreover, since peacekeeping personnel could be regarded as combatants and other personnel as civilians, the Statute already covered United Nations personnel and the paragraph could therefore be deleted.

36. His delegation favoured deletion of sections C and D relating to internal armed conflicts, as not being in keeping with international customary law; however, it was open to other suggestions. Specific provision should also be made within the Statute for the elements of crimes, and discussion on that issue could be continued after the Conference.

37. Mr. MOCHOCHOKO (Lesotho) said that the African Group supported the inclusion of the core crimes of genocide, crimes against humanity and war crimes in the Statute. It was in favour of including other crimes, in particular aggression, if appropriate definitions could be found and agreement reached on other issues.

38. Mr. DAUTO JEICHANDE (Mozambique) said that his delegation supported the inclusion of genocide, crimes against humanity and war crimes as crimes within the Court's jurisdiction. It also favoured inclusion of the crime of aggression in the Statute, although the Security Council also had a role to play in safeguarding peace and security. His delegation supported option 1 in respect of treaty crimes.

39. Mozambique had no problems with the texts on genocide and crimes against humanity. As for war crimes, its preference was for option 2 in the *chapeau*. With regard to section B, paragraph (o), his delegation preferred option 2 as being more inclusive. On sections C and D, his delegation was also in favour of option 1. With regard to aggression it favoured option 1, with the incorporation of elements from General Assembly resolution 3314 (XXIX).

40. Mr. SALAND (Sweden) said his delegation was in favour of including the crime of aggression, provided satisfactory definition could be found and the role of the Security Council under the Charter was respected. It was also satisfied with the definition in option 1, but in view of the continued efforts to refine it, felt that option 2 ("no such provision") might have to be adopted for lack of time—an outcome Sweden did not favour. As for treaty crimes, his delegation had serious doubts that it would prove possible to include them at the present juncture.

41. He supported the *chapeau* of the provision on crimes against humanity proposed by the Jordanian delegation. As for the threshold for war crimes, his delegation had always supported option 3 ("no such provision") but could reluctantly agree to option 2 if a consensus existed.

42. With regard to paragraph (o) of section B, his delegation had originally supported the generic approach in option 3, but since clarity was important to many delegations it was willing to work on the basis of option 1. It attached great importance to subparagraph (vi) under that option, in the light of its continued interest in the issue of anti-personnel land mines. Sweden also remained attached to the idea of adding weapons and methods of warfare that were inherently indiscriminate to the requirements set forth in the *chapeau* of option 1.

43. His delegation had grave doubts about the advisability of including elements of crimes in the Statute but was prepared to consider their inclusion as guidelines rather than as absolute provisions.

44. Mr. CHUKRI (Syrian Arab Republic) said he considered that the introductory sentence added to article 5 weakened the article and that the wording of the *chapeau* should remain unchanged. With regard to aggression, he was dismayed by the proposal in option 2 to delete that crime, and wondered why no account appeared to have been taken of the definition proposed in document A/CONF.183/C.1/L.37 by his delegation and others.

45. As far as treaty crimes were concerned, his delegation, while condemning the crime of terrorism, believed that it had not been well defined and should therefore be omitted from the Statute. Moreover, drug crimes and crimes against United Nations personnel had no place in a statute dealing with international crimes.

46. With regard to crimes against humanity, his delegation would prefer the wording "widespread and systematic attack", but was prepared to accept the wording "widespread or systematic attack". Serious consideration should be given to including economic embargoes under crimes against humanity, for, if protracted, they were tantamount to murder.

47. With regard to the *chapeau* for war crimes, his delegation was in favour of option 3 ("no such provision") but was prepared to accept option 2. As for weapons, his delegation was in favour of option 2, though it did not insist on the inclusion of anti-personnel mines. Options 1 and 3 were totally unacceptable.

48. Option 1 concerning aggression raised the issue of a determination by the Security Council. In that connection, article 6 should be amended so that the Court could exercise jurisdiction if a situation was referred to the Prosecutor by the Security Council or by the General Assembly. Alternatively, where, following exercise of the right of veto, the Security Council failed to make a determination of aggression, the Court should be free to exercise its jurisdiction upon the complaint of a State.

49. He considered that the issue of elements of crimes was too complex to be included. Referring to article 20 (Applicable law), he said that there was no such concept as "general international law". The correct wording should probably be "international customary law". Lastly, although his delegation was opposed to including sections C and D, which extended the Court's jurisdiction to armed conflict not of an international character, it might be willing to consider section C if certain criteria, such as the total collapse of a country's central regime were included.

50. Mr. FIFE (Norway) endorsed the position of the Swedish delegation with regard to the crime of aggression. With regard to treaty crimes, he agreed on the need for a unified approach, although his delegation would have

preferred crimes against United Nations personnel to be included. However, those crimes might be reviewed at a later stage.

51. On the need for a threshold on war crimes, in a spirit of compromise his delegation was prepared to consider option 2. On weaponry, it saw no alternative to option 1. It was not entirely satisfied with subparagraph (vi) but was prepared to discuss it further.

52. His delegation considered it essential to include sections C and D in the Statute, in order to extend the Court's jurisdiction to internal conflicts. It believed that the threshold was already high enough and that the text was clear, but was prepared to discuss the drafting to clarify it even further.

53. As to the provision on elements of crimes, although Norway was basically opposed to its inclusion, a basis for consensus was emerging which his delegation was prepared to join.

54. Mr. DADOR (Sierra Leone) said that his delegation supported the inclusion of the crime of genocide, crimes against humanity and war crimes. With regard to the latter it considered that there should be no threshold, but as a compromise was prepared to accept option 2. It would support the inclusion of the crime of aggression if an acceptable definition was agreed upon and the role of the Security Council defined.

55. While appreciating the seriousness of the treaty crimes and their adverse effect on society, his delegation thought that those offences should not be included at present, and it therefore preferred option 2. With regard to paragraph (o) in section B, it could accept either option 1 or option 2. It strongly supported the inclusion of sections C and D since, as was well known, his country was undergoing an internal conflict in which very serious offences had been committed over which the Court should have jurisdiction.

56. His delegation had not been in favour of including elements of crimes in the Statute, but in the light of the discussion in the Working Group on War Crimes its attitude was now flexible. However, if the elements were included his delegation would prefer them not to be of a binding nature but merely to serve as guidelines for the Court. Moreover, any discussions on that provision should be left until after the Statute had been finalized.

57. Mr. GADYROV (Azerbaijan) said his delegation strongly supported inclusion of the crime of aggression in the Statute. An appropriate definition could be found if the will existed to do so. Moreover, without prejudice to its role in maintaining international peace and security, the Security Council should not be the only trigger mechanism with respect to the crime of aggression: any State affected by an act constituting aggression should be able to lodge a complaint with the Court.

58. His delegation had no strong position on the inclusion of treaty crimes but wondered whether provision should not be made for other crimes covered by existing or future treaties. It did not feel that a threshold for war crimes was needed but was prepared to work on option 2 in an attempt to secure a compromise. On weapons, it supported option 3 but was prepared to consider other options.

59. His delegation had no problems with including section C and agreed with the representative of Norway regarding the threshold. However, his Government was not prepared to accept section D since it was not a party to the Second Protocol Additional to the Geneva Conventions.

60. His delegation was not opposed to including a definition of elements of crimes, but wondered whether the elements would have the same legal force as other provisions of the Statute or whether they would simply be guidelines for interpretation by judges.

61. His delegation had some concerns about the terminology used in the Statute. Words such as "wilfully", "intentionally" and "knowingly" were used interchangeably, whereas each term should have its own meaning. Problems of interpretation might arise for judges; moreover, there might not be an appropriate translation of all those terms in some languages. Thus, for instance, his delegation was concerned about the use of the word "gender" in paragraph 1 (h) under "Crimes against humanity". Did that provision imply that a conviction by a national court for homosexual acts might be regarded as persecution and thus fall within the jurisdiction of the Court as a crime against humanity? He asked for clarification in that regard.

62. Ms. CHATOOR (Trinidad and Tobago) endorsed the remarks of the representative of South Africa but was concerned that the effectiveness of the Court should not be undermined by a high threshold for war crimes. Her delegation's preference would have been for no threshold, but it could accept option 2. Internal armed conflict was currently the most prevalent form of conflict, and it was thus absolutely essential to include sections C and D. Her delegation was also in favour of including all the treaty crimes in the Statute. A separate regime through the opt-in mechanism would assist in that regard.

63. Mr. GONZALEZ GALVEZ (Mexico) said it was important that the Statute should not include provisions subordinating the authority of the Court to that of the Security Council, in contravention of article 53 of the Vienna Convention on the Law of Treaties. Mexico had put forward its own proposals in connection with the crime of aggression, but could accept the similar proposals of the representative of the Syrian Arab Republic in that regard. In other words, it could agree to the reference to the Security Council as long as reference was also made to the General Assembly and a paragraph included to the effect that referral of an act of aggression to the Court by the Security Council was pursuant to Article 27 (2) of the Charter, and would thus be considered as a procedural matter to which the right of veto would not apply.

64. With regard to weapons, his delegation was willing to support option 3, the provisions of which would apply to nuclear weapons since they were inherently indiscriminate.

65. With regard to the elements of crimes, Mexico could not agree to sign or ratify the Statute until that provision had been finalized. It was prepared to accept the inclusion of non-international armed conflict in the Statute as long as no reference was made to Protocol II to the 1949 Geneva Conventions, an instrument to which it was not a party. It considered that discussions should continue on the thresholds for crimes against humanity and war crimes, and would be pleased to submit its own proposals if that would advance the Committee's work. Alternatively, those proposals might be taken into account in preparing the new version of document A/CONF.183/C.1/L.53.

66. Ms. WILMSHURST (United Kingdom) said that her delegation believed that option 1, which reflected a long process of negotiation in the Preparatory Committee, could form the basis for general agreement on the crime of aggression. If agreement could not be reached on all the elements of option 1, option 2 ("no such provision") was the only realistic alternative.

67. The difficulty with including treaty crimes was not just the complexity of the issue but the fact that many believed that the Court was not the best forum in which to try issues involving terrorism and drug offences. Her delegation could not see a way of including treaty crimes that would command general acceptance. As to the threshold for war crimes, her delegation believed that option 2 was the best way forward.

68. With regard to weaponry, option 1 was closest to her delegation's views, but subparagraph (vi) needed reconsideration since it was tied to the amendment procedures, which were not yet agreed. With regard to the inclusion of non-international conflicts within the jurisdiction of the Court, her Government regarded it as essential that sections C and D should be included in the Statute without any opt-in or opt-out provision, and without the possibility of reservations. Inclusion of elements of crimes could be useful, but they should not hold up the entry into force of the Statute. The elements should be transmitted to the Preparatory Commission for further elaboration.

69. Mr. KAUL (Germany) said that his delegation could agree to the definition of aggression in option 1. With regard to the note in the discussion paper that elements from General Assembly resolution 3314 (XXIX) might be inserted in the definition, he pointed out that important elements from that resolution were already included. At the end of paragraph 1 of option 1, the words "with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof" were based on article 3 (a) of resolution 3314 (XXIX). Moreover, the entire approach underlying option 1 was based on article 5 of resolution 3314 (XXIX), which included the words: "A war of aggression is a crime against international peace". His understanding was that the provisions on aggression referred to wars of aggression, not to single, specific aggressive acts.

70. With regard to option 2 ("no such provision"), he reluctantly conceded that that option might in the end have to be adopted. Attempts to make the definition too broad would simply preclude general agreement, while attempts to ignore the responsibility of the Security Council would also rule out the adoption of option 1. However, his delegation was prepared to persevere with the attempt to find a solution.

71. His delegation's position on treaty crimes was similar to that outlined by the representative of the United Kingdom, but again, his delegation was prepared to work on a compromise. It felt that there was a need for a threshold clause for war crimes and that option 2 might be an appropriate compromise. With regard to the weaponry provision for war crimes, option 1 was essential, as was the inclusion of sections C and D.

72. With regard to elements of crimes, his delegation had carefully studied the United States proposal and considered that their inclusion might be useful, although it was not absolutely necessary. Germany would therefore be pleased to participate in the discussion in a follow-up phase to the Rome Conference. However, failure to reach general agreement on the elements and definitions should not prevent early entry into force of the Statute. Consideration might be given to the possibility of adding definitions and elements in the form of an annex to the Statute in due course.

73. Mr. TATA (Botswana) said that his delegation favoured the inclusion of genocide, crimes against humanity and war crimes as core crimes in the Statute. Aggression should also be included as a core crime, subject to an acceptable definition being found.

74. With regard to crimes against humanity, his delegation supported the *chapeau* as currently worded. As for war crimes, in principle his delegation considered that there should be no threshold whatsoever, but it was prepared to consider option 2. With regard to weapons, its preference was for option 2, and for inclusion of C and D. It was in favour of including treaty crimes, but since they were all equally important, they must either all be included, or all excluded. If elements of crimes were included, they should take the form of guidelines of a non-binding nature.

75. Ms. PLEJIĆ-MARKOVIĆ (Croatia) endorsed the views of the presidency of the European Union with regard to article 5. Croatia was strongly in favour of including the crime of aggression, as currently defined, in the Statute. It was therefore in favour of option 1. Omission of aggression would send a very dangerous message to

aggressors throughout the world. Her delegation had a flexible attitude with regard to the inclusion of treaty crimes, and found the present definition of genocide acceptable.

76. The solution proposed with regard to crimes against humanity was satisfactory. Croatia was prepared to work with others on the remaining unresolved questions. For war crimes, her delegation was in favour of option 2, with strong emphasis on the words "for the purpose of the present Statute". With regard to weaponry, her delegation was in favour of option 1, although subparagraph (vi) might give rise to problems of interpretation. Croatia was strongly in favour of including sections C and D since internal conflicts were now the rule rather than the exception. Her delegation's position with regard to the inclusion of elements of crimes was still open.

77. **Mr. ROWE** (Australia) said that his delegation acknowledged the importance of the crime of aggression, but agreed that the definition had to be satisfactory and that the role of the Security Council under the Charter must be respected. However, since time was running out, efforts to include aggression in the Statute at the Rome Conference might have to be abandoned. The same applied to treaty crimes. The primary focus must now be on the three core crimes of genocide, crimes against humanity and war crimes.

78. His delegation endorsed the support expressed for the text on crimes against humanity, in particular the words "widespread or systematic" in the *chapeau*. With regard to the need for a threshold for war crimes, Australia had favoured option 3 but in view of the emerging consensus could now support option 2. It was unable to support option 1. In relation to the weapons provision, it had originally favoured the generic provision in option 3, but could now accept option 1 in the light of the strong support expressed for it. It was absolutely essential to include sections C and D in the Statute. Efforts to find an acceptable wording should therefore continue. Lastly, elements of crimes would be of assistance to the Court, but their elaboration must not impede the entry into force of the Statute.

79. **Mr. NDIR** (Senegal) said his delegation agreed with the definitions of genocide and crimes against humanity. It could support the inclusion of the crime of aggression in the Statute, but an acceptable definition had to be found.

80. With regard to treaty crimes, drug-related crimes should be dealt with by the United Nations International Drug Control Programme and should not be included in the crimes covered by the Statute. On weaponry, his delegation was in favour of option 3 for paragraph (o) of section B, but would be ready to accept option 1 as a compromise. Lastly, it was essential that internal conflicts should be included within the jurisdiction of the Court.

MESSAGE FROM THE SECRETARY-GENERAL

81. **Mr. CORELL** (Representative of the Secretary-General) drew attention to a letter from the Secretary-General to the President of the Conference (A/CONF.183/INF.8), expressing his hope that the participating States would find the necessary spirit of cooperation to be able to finalize the Statute on 17 July 1998 with a view to creating a Court that would be strong and independent enough to carry out its task. The Secretary-General reiterated that the overriding interest must be that of the victims and of the international community as a whole. The Court must be an instrument of justice, not expedience. It must be able to protect the weak against the strong, and demonstrate that an international conscience was a reality.

The meeting rose at 1.20 p.m.



UNITED
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United Nations Diplomatic Conference
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of an International Criminal Court

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE TWENTY-SIXTH MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Wednesday, 8 July 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item

Paragraphs

- | | | |
|----|---|-------|
| 11 | Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (<i>continued</i>) | 1-132 |
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The meeting was called to order at 3.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.2/Add.3; A/CONF.183/C.1/L.4/Add.3; A /CONF.183/C.1/L.11/Add.1 and Corr.1; A/CONF.183/C.1/L.14 and Add.1; A/CONF.183/C.1/L.15/Corr.1; A/CONF.183/C.1/L.45/Add.1; A/CONF.183/C.1/L.49/Rev.1; and A/CONF.183/C.1/L.53)

Part 9 of the draft Statute (continued)

1. **Mr. MOCHOKOKO** (Lesotho), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/C.1/L.11/Add.1 and Corr.1. The Working Group had recommended the transmission to the Committee of the Whole, for referral to the Drafting Committee, of article 87, paragraphs 1 and 11, article 90, paragraphs 1, 1 *bis* and 1 *ter*, as well as paragraphs 6 and 7, and articles 90 *ter* and 90 *quater* in their entirety. Some amendments to document L.15/Corr.1 had been agreed upon in the Working Group. In article 90, paragraph 1 and the *chapeau*, the words "in relation to investigations or prosecutions" had been inserted after the word "assistance". In article 90, paragraph 1 (e), the words "witness and experts" had been replaced by "witness or experts". The text of article 90 *quater* had been changed and now read as follows:

"The Court may not proceed with a request for surrender/cooperation which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

2. **The CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

3. *It was so decided.*

Part 8 of the draft Statute (continued)

4. **Ms. FERNANDEZ de GURMENDI** (Argentina) Coordinator, introduced the report of the Working Group on Procedural Matters pertaining to for Part 8, article 82, paragraphs 1 to 3, paragraph 4, first subparagraph, and paragraph 5; article 83, paragraphs 1 and 3, as contained in document A/CONF.183/C.1/L.2/Add.3.

5. **The CHAIRMAN** asked the Committee if it wished to refer those articles to the Drafting Committee.

6. *It was so decided.*

Part 3 of the draft Statute (continued)

7. **Mr. SALAND** (Sweden), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/C.1/L.4/Add.3.

8. He said that the Working Group had adopted article 31, paragraph 1, subparagraph (c), dealing with self-defence. Footnote 1 to that subparagraph, reading: "This provision only applies to actions by individuals during an armed conflict" was not intended to apply to the use of force by States, which was governed by applicable international law. Footnote 2 referred to the word "imminent" in the fourth line of the English text and read: "This provision is not intended to apply to international rules applicable to the use of force by States", while footnote 3, reading: "Some delegations were of the view that this was applicable only in the context of a lawful operation" referred to the whole paragraph.

9. Footnote 5 contained the important interpretative statement that cases of voluntary exposure were understood to be dealt with under paragraph 2 of article 31. There was also a footnote that the Drafting Committee would find it useful to consider in view of the very long and difficult negotiations on that paragraph.

10. Regarding paragraphs 5 and 6 of article 23, on the criminal responsibility of juridical persons, all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion. Consequently, the deletion of those paragraphs was noted.

11. He suggested that it would be easier to conclude work on article 20 if a working group were set up for that purpose.

12. The CHAIRMAN asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group and to set up a working group to consider article 20.

13. *It was so decided.*

Part 4 of the draft Statute (continued)

14. Mr. RWELAMIRA (South Africa), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/C.1/L.45/Add.1 dealing with article 43, paragraph 2, article 45, article 52, paragraph 3, and article 53, paragraph 1.

15. Some delegations had felt that it was also necessary to reflect the discussion on article 105, dealing with the funding of the Court. It was also suggested that the proposed 4 *bis* of paragraph 2 could be included in paragraph 4.

16. A number of delegations had felt quite strongly that the Court should not become operational before the Rules of Procedure and Evidence had been finalized.

17. The CHAIRMAN asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report.

18. *It was so decided.*

Part 10 of the draft Statute (continued)

19. Ms. WARLOW (United States of America), Coordinator, introduced the report of the Working Group on article 94, paragraph 3, article 94 *bis*, article 95, article 96, article 97, article 98, article 99, paragraphs 1 and 1 *bis*, as contained in document A/CONF.183/C.1/L.14.

20. The **CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

21. *It was so decided.*

Part 13 of the draft Statute (continued)

22. Mr. **RAMA RAO** (India), Coordinator, introducing document A/CONF.183/C.1/L.49/Rev.1 on the Final Act, said that paragraphs 14, 15 and 16 would be completed following the meeting of the Credentials Committee and that any further resolutions would be included on page 7, subject to decisions by the Committee of the Whole.

23. All the resolutions to be annexed to the Final Act were indicated on page 8 of the report. A new paragraph 3 *bis* had been introduced in the annex in the light of the proposal made by several delegations on the official and working languages of the Preparatory Commission. The text of paragraph 4 (a) would be adjusted in the light of the final decision on the inclusion of elements of crimes under the Rules of Procedure and Evidence, as stated in footnote 1. Paragraph 7 was subject to a decision on article 104, dealing with the funding of the Court.

24. Mr. **GÜNEY** (Turkey) said that, during the previous discussion of the matter, he had proposed that the words "initially prepared by the ILC" be added after the words "International Criminal Court" in line 2 of paragraph 21, so as to reflect the history of preparing the draft Statute. That proposal had been supported by other delegations, and there had been no objection. Therefore, the paragraph should be amended accordingly.

25. Mr. **RAMA RAO** (India) said that a tribute to the immense contribution of the International Law Commission was reflected in paragraphs 3 to 9.

26. Mr. **GÜNEY** (Turkey) said that, although the draft before the Conference was submitted by the Preparatory Committee, the initial basis had been the draft prepared by the International Law Commission. However, he did not wish to create difficulties by pressing the point.

27. Ms. **WILLSON** (United States of America) said that any conference servicing or other expenses in connection with meetings of the Preparatory Commission arranged pursuant to operative paragraphs 1 and 7 of the resolution annexed to the Final Act must be accommodated within the current budget.

28. The **CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

29. *It was so decided.*

Part 7 of the draft Statute (continued) (A/CONF.183/L.14/Add.1)

30. Mr. **FIFE** (Norway), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/L.14/Add.1, and announced a number of amendments. The sentence in paragraph 1 reading "The Working Group herewith transmits to the Committee of the Whole the following articles of Part 7 for its consideration" should be deleted. In the next sentence, the word "also" should be deleted. Paragraph 1 should read:

"The Working Group on Penalties held one additional meeting to consider the remaining articles contained in Part 7, Penalties, on 7 July 1998. The Working Group transmits the following article for inclusion in Part 3:

article 21 *bis*. The Working Group further notes the deletion of article 76. The remaining articles will be transmitted at a later stage."

31. In the text of the draft articles, article 21 *bis* was unchanged, with its footnote 1. In article 75, on applicable penalties, the text of paragraph 1 and footnote 2 should be deleted, and a colon and the word "Pending" should be added. The note on page 3 of the English text should be deleted. Article 76 should remain as it was. Article 77, paragraph 3, was still pending.
32. The CHAIRMAN asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.
33. *It was so decided.*
34. Mr. KATUREEBE (Uganda), referring to document A/CONF.183/C.1/L.53, said that the crimes over which the Court had jurisdiction should be clearly defined, in order to avoid objections on technicalities. He had no objection to the definitions of genocide or crimes against humanity contained in the document. With respect to war crimes, he supported option 2. However, those crimes for which no agreed definition could be found should be left for further consideration, either by the Preparatory Commission or by the Assembly of States Parties. Situations of internal conflict must be included, the threshold being armed conflict. He felt very strongly that the Court should also concern itself with the systematic abduction, rape and abuse of children.
35. Mr. GÜNEY (Turkey), referring to crimes against humanity, said that he favoured the updated version contained in document A/CONF.183/C.1/L.44, which included, in brackets, the crime of terrorism, and explained that its inclusion had received substantial support. The inclusion of war crimes was essential, and he strongly supported option 1. He was fully aware of the problems of finding an acceptable definition of aggression, while keeping in mind the role of the Security Council as established under the Charter.
36. There should be a unified approach to treaty crimes, covering terrorism and drug trafficking, as well as crimes committed against United Nations personnel. The elements of any crime must be determined before it could be placed under the jurisdiction of the Court.
37. Mr. WENAWESER (Liechtenstein) said that, since problems of definition persisted with regard to aggression and the related role of the Security Council, that crime should not initially be included in the jurisdiction of the Court. He also advocated a unified regime of jurisdiction for treaty crimes, subject to review after the entry into force of the Statute. On the question of the war crimes threshold, he preferred option 3, but would continue to work on option 2, which seemed to find the broadest support.
38. It would be unacceptable if the Court were not competent to deal with crimes committed in internal armed conflict. He therefore strongly supported the inclusion of both sections C and D.
39. Under section B (o) on weapons, he had always preferred option 3, but was ready to work on option 1, which seemed to find the broadest support. It was not necessary to include the elements of crimes.
40. Mr. PFIRTER (Switzerland) said that major complications might arise in defining jurisdiction over treaty crimes, and that the question should be left to a review conference. The *chapeau*, which touched on a jurisdictional issue, was inappropriate in a definition of war crimes. He preferred option 3, but could compromise, somewhat reluctantly, on option 2. As for the list of prohibited weapons contained in section B (o), he favoured option 3. For

the sake of consensus on that matter, he could accept option 1, if the words "or with indiscriminate effects" were added to the *chapeau*. Subparagraph (ix) of option 2 should refer not only to article 111 on a review conference, but also to article 110 on amendments. Subparagraph (iii) of options 1 and 2 should also include weapons that exploded within the human body, and should begin with the words "explosive or dilating bullets".

41. Without wishing to limit the rights of States to ensure internal security, he pointed out that the majority of atrocities stemmed from internal conflicts. Section C undoubtedly reflected customary international law. It was precisely because some countries had not ratified Additional Protocol II that the Preparatory Committee had been very selective in the crimes it included under section D. That list had since been further shortened, by the omission of the crimes listed under option II. He drew attention to the abuses that had occurred in many countries and asked those delegations that had problems with section D to consider the merits of including such crimes, so as to arrive at a consensus.

42. It would be superfluous to include elements of crimes, since the crimes were well defined in international case law and international practice. There was the potential danger of giving rise to contradictions. However, he could consider adopting such a list, if it did not prevent the adoption and entry into force of the Statute, and was of a strictly advisory nature.

43. Mr. NYASULU (Malawi) supported the statement made by South Africa on behalf of the South African Development Community (SADC), adding that there seem to be an emerging sense that it might be useful to elaborate the elements of crimes.

44. Mr. PAULAUSKAS (Lithuania) said that he endorsed the statement made by Austria on behalf of the European Union. He was fully in favour of including the three core crimes and strongly supported the inclusion of aggression, based on the definition in option 1. The role of the Security Council in determining the fact of aggression should be acknowledged. With regard to the threshold for war crimes, he preferred option 3, but could accept option 2. He also supported the proposal to include crimes against United Nations and associated personnel as a separate paragraph under war crimes. He strongly favoured the inclusion of sections C and D. The proposal on elements of crime had merit and deserved consideration.

45. Mr. VERGNE SABOIA (Brazil) said that he was very much in favour of the early establishment of an efficient, independent and impartial court. In the context of a reasonable compromise, however, nothing should be done to undermine what had already been achieved in terms of international law. Article Y should be retained as a safeguard for existing international law and its progressive development.

46. The Court's jurisdiction should be limited to the three core crimes. He would be more in favour of the early inclusion of aggression if an acceptable definition of that crime could be found, bearing in mind the related role of the Security Council, but that was so far not the case.

47. As regards treaty crimes, he shared the views expressed by the United Kingdom delegation and Japan, among others. Including such crimes raised substantive and practical difficulties because of their different nature and the different circumstances under which they occurred. He agreed that such acts were serious and should be the subject of international cooperation to fight them, but the Court was being set up to deal with the core crimes. It would be impractical and costly to include treaty crimes during the early stages of the Court's existence. The question could be reviewed later.

48. He warmly supported the text on crimes against humanity. A balance had been achieved in paragraph 1, taken in combination with paragraph 2 (a). He doubted whether terrorism could be included, but would adopt a flexible attitude if a satisfactory definition could be found. Economic embargoes should not be included, because the Statute dealt with criminal acts on a personal and individual basis.

49. Option 2 on war crimes represented a possible compromise; any higher threshold would threaten the existing rules of international law, particularly in view of the threshold provision at the beginning of article 5.

50. With regard to weapons, he was initially inclined to favour option 2 of section B (o), including nuclear weapons, anti-personnel mines and blinding laser weapons; however, realistically, it would be more constructive to use option 1 at the current stage. He shared the views of Switzerland on inherently indiscriminate weapons and explosive bullets.

51. He supported the inclusion of sections C and D, since their introductory paragraphs already contained safeguards relevant to the concerns of some delegations. With regard to section B (t) of the draft Statute, he said that the minimum age for recruitment of children should be 18 and certainly not less than 15. Any solution taking account of concerns about the inclusion of internal armed conflicts must ensure that existing commitments under customary international law were in no way undermined. His position on the inclusion of the elements of crimes was fairly flexible, though he had noted with interest the comments by Switzerland.

52. Mr. Kalk-Seo SHIN (Republic of Korea) said that he strongly supported the inclusion of aggression in the Statute, and would accept the current option 1, including its reference to the role of the Security Council, but recalled his delegation's proposed compromise between options 1 and 2 contained in article 10, paragraph 4, option 2 of the draft Statute.

53. While he sympathized with those who had suffered from drug trafficking and terrorism, he said that time constraints at the Conference required a sense of realism. A gradual approach to the inclusion of treaty crimes, involving the review process, could be adopted. On the *chapeau* for war crimes, his original preference had been for option 3 but, in a spirit of compromise, he could accept option 2.

54. He strongly supported option 1 of sections C and D. If a court were set up without jurisdiction over war crimes committed during non-international armed conflicts, its *raison d'être* would be seriously undermined.

55. In section B (o), he favoured option 1, in the light of the principle of *nullum crimen sine lege* and the conviction that the list of prohibited weapons must be based on customary international law.

56. The proposed inclusion of elements of crime would be useful as a guideline rather than a binding rule.

57. Mr. MAQUEIRA (Chile) said that he favoured the inclusion of aggression. However, for the reasons that had emerged during the Conference concerning the definition, and complexities of a jurisdictional nature, he would be open to other solutions. Treaty crimes should not be included, for the reasons given by many other delegations. On war crimes, he supported option 3, but, to achieve a consensus, he was prepared to accept something along the lines of option 2.

58. Although his delegation had always favoured option 1 of section B (o) on weapons, he had, for the sake of making progress, considered the possible merits of option 3. He hoped agreement could be reached on the inclusion of crimes against United Nations personnel and supported the inclusion of non-international armed conflicts.

59. Regarding aggression and the related role of the Security Council, he said that the formula currently proposed was acceptable. He expressed surprise that the elements of crime needed to be set out in the Statute, but was prepared to move in that direction, provided that it did not affect the entry into force of the Statute.
60. **Mr. ODOI-ANIM** (Ghana) said that he associated himself with the general thrust of the statement by Lesotho on behalf of the African Group.
61. The Court should have jurisdiction over genocide, crimes against humanity, and war crimes, but not, at the current juncture, over aggression, as that would inevitably cause conflict with the Security Council.
62. The inclusion of the treaty crimes, particularly terrorism and drug trafficking, would only heighten national sensitivities, and would therefore not be conducive to the desired cooperation envisaged for their effective prosecution.
63. He welcomed the general approach to crimes against humanity and preferred option 1 on war crimes.
64. The judges of the Court must display flexibility in applying the Statute, bearing in mind the need to ensure successful prosecutions, without conflicting with national systems. The purpose of the Court was to make sure that national systems worked efficiently so that there would be no need for it to intervene.
65. **Mr. OUMAR MAIGA** (Mali) said that he concurred with the statement made by Lesotho on behalf of the African Group. He favoured the inclusion of genocide, crimes against humanity and war crimes. In the *chapeau* on war crimes, he preferred option 3. Aggression should not be included at that stage, because it was an act for which no generally acceptable definition had yet been found. He favoured a list of weapons such as that in option 1 of section B (o), taking into account the comments made by Switzerland.
66. Most conflicts were internal in nature, so sections C and D should be included in the Statute. It would be premature to include treaty crimes in the Statute, which should be referred to a review conference.
67. **Mr. POLITI** (Italy) said that he fully concurred with the remarks made by Austria on behalf of the European Union. He was strongly in favour of the inclusion of aggression in the Statute. However, if no agreement were reached on a definition and on the relationship with the Security Council relatively soon, it would be necessary to revert to option 2, at least temporarily.
68. While he was sympathetic to at least some of the reasons given for considering the inclusion of treaty crimes, he thought that it was unrealistic to expect that agreement would be reached at the current juncture; the issue should therefore be left to a review conference.
69. Crimes against United Nations personnel could be addressed in the context of war crimes. Concerning the war crimes threshold, he favoured option 3, but was prepared to accept option 2. On weaponry, option 1 under section B (o) offered a possible basis for compromise. The inclusion of sections C and D was an essential element of Italy's position.
70. He doubted the need to include the elements of crimes, because it was a notion foreign to his country's legal system, but he was ready to discuss their elaboration, perhaps in the form of guidelines, after the opening of the Statute for signature at the end of the Conference.

71. **Mr. AGBETOMEY** (Togo) said that he was not, in principle, opposed to the inclusion in the Statute of all the crimes mentioned in the document. However, no appropriate definition of aggression had emerged. He saw no particular reason to include treaty crimes. As for the war crimes threshold, he preferred option 3, although he remained flexible. Concerning weaponry, he preferred option 3 of section B (o), since it was open and could be changed with respect to both cause and effect.

72. Sections C and D on non-international armed conflicts must be included in the Statute, as the credibility of the Court depended on it.

73. **Mr. BAZEL** (Afghanistan) said that he favoured including aggression, for the reasons he had set out in the general debate at the beginning of the Conference. As far as the definition of aggression was concerned, he preferred option 1, provided that it incorporated some elements of General Assembly resolution 3314 (XXIX), such as the sending by a State of armed bands, groups, irregulars or mercenaries which carried out acts of armed force against another State.

74. Concerning the war crimes threshold, he was in favour of option 2. In section B (o), he supported option 1, with the inclusion of blinding laser weapons as subparagraph (vii).

75. On the question of non-international armed conflict, while he again emphasized the principle of complementarity, he expressed his preference for option 1 of section C, for the reasons given by Syria. He also supported the inclusion within the jurisdiction of the Court of crimes against United Nations and associated personnel.

76. **Mr. PERAZA CHAPEAU** (Cuba) said that the Court must be competent to deal with a crime such as aggression, since an aggressor generally committed other war crimes as well. Aggression should not be linked to a role of the Security Council. Even if the Security Council were to play a part, the General Assembly would have to be involved. With regard to aggression falling within the jurisdiction of the Court, exercise of the veto should not be allowed.

77. Genocide, as defined in the 1948 Convention, must clearly come under the Court's jurisdiction. The thresholds of war crimes should be based on the definitions in the Geneva Conventions of 1949; he could accept option 2. Option 1 (vi) of section B (o) required revision in order to find agreed wording.

78. As regards sections C and D, a generally acceptable formulation must be found on non-international armed conflicts. The use of weapons of mass destruction with indiscriminate effects on combatants and non-combatants, should also constitute a crime within the jurisdiction of the Court.

79. The crimes falling under the jurisdiction of the Court must be precisely defined, in accordance with the general principle of *nullum crimen sine lege*.

80. The imposition of a permanent economic blockade should be included as a crime against humanity under the jurisdiction of the Court. That was the basis of the Cuban proposal contained in document A/CONF.183/C.1/L.17.

81. **Mr. DA COSTA LOBO** (Portugal) said that his delegation fully associated itself with the statement made by Austria on behalf of the European Union. He favoured including aggression, provided that agreement could be reached on an adequate definition and on the role of the Security Council.

82. Treaty crimes were of great concern to the international community, but, for reasons given by previous speakers, the matter would be better left to a future revision of the Statute. In the war crimes *chapeau*, he would prefer option 3 but could accept option 2. Regarding the provisions on weapons in section B (o), he preferred option 1. He strongly supported the inclusion of sections C and D on non-international armed conflicts, because the scope of the Court should not exclude situations where the most serious crimes occurred. He had doubts about including the elements of crimes, but was prepared to continue to examine the issue.

83. Mr. PAL (India) said that aggression, if properly defined, should in principle be included under the ICC Statute. Treaty-based crimes must also be included since, like the core crimes, they affected people's daily lives.

84. With regard to the *chapeau* on crimes against humanity, he very strongly believed that such crimes applied only to situations of armed conflict. He noted that China shared that concern.

85. There was general agreement in the context of the threshold for war crimes that the ICC would deal only with situations of an exceptional nature. He could therefore support only option 1. The wording of options 2 and 3 would leave it open to the ICC to seek jurisdiction even in situations below the threshold.

86. If the ICC was to deal with the most heinous crimes, it must also address the means of committing them, namely, weapons. Nuclear weapons, with the potential to create the most widespread damage, must be brought within the provisions of the Statute.

87. On principle, he did not agree to the inclusion of either section C or D.

88. Regarding the elements of crimes, the Preparatory Commission procedure could be used to elaborate the elements of the so-called core crimes, and also of aggression and treaty-based crimes.

89. Mr. SINJELA (Zambia), speaking also on behalf of Swaziland, said that most of his comments had already been expressed by the representative of South Africa, speaking on behalf of the SADC countries. However, he wished to state that he strongly believed that aggression should come under the jurisdiction of the Statute.

90. Mr. SLADE (Samoa) said that he continued to advocate the inclusion of aggression. However, he recognized the problem of defining the crime itself and the related role of the Security Council, which should not jeopardize the success of the Conference. Treaty crimes should also be included, bearing in mind that it was concerns about one of those crimes that had originally inspired the Conference. However, if the related difficulties could not be resolved in time, he would join those who insisted that provision be made for the future inclusion of those crimes, perhaps through the review of the Statute.

91. In the area of war crimes, the inclusion of nuclear weapons was of particular importance. He strongly supported option 3 of section B (o), the language of which was consistent with that of the Hague Conventions. Article Y should be included in the Statute, under war crimes or elsewhere. In respect of both options 1 and 2, he agreed with the suggestion by New Zealand on explosive bullets.

92. The elaboration of the elements of crime could be beneficial but could appropriately be left to a future meeting.

93. Mr. DALTON (United States of America) said that the effectiveness of the Court would largely be judged by the willingness of a significant number of States to join in the treaty and assist the Court in bringing individuals

to justice. Its membership would be limited if it sought to overreach established customary international law or set aside national judicial principles.

94. The Court's jurisdiction should be limited to genocide, crimes against humanity and war crimes. The inclusion of terrorism would serve no useful purpose. It would be neither appropriate nor wise for the Court to address isolated war crimes, action against which must be taken through concerted national action.

95. With respect to war crimes thresholds, he supported option 1. The fundamental premise was that the Court must deal only with certain heinous crimes of concern to the international community, which were committed at a relatively high threshold of criminal activity. How to apply the appropriate threshold should be left to the Prosecutor and the judges, but they had a duty to use the limited resources of the Court only in the case of crimes committed as part of a plan or policy, or on a large scale.

96. In section B, paragraph (o), he strongly favoured option 1, subject to a revision of subparagraph (vi) to provide for amendment of the list to avoid the risk of adding weapons to the list without appropriate deliberation. The United States could not accept option 2. Option 3 failed to determine precisely which weapons it would be criminal to use under any circumstances, which was the standard required to establish individual criminal responsibility.

97. Sections C and D were vital to the integrity and rationale of the Court. He hoped that the concerns of certain delegations could be accommodated by appropriate wording, in the *chapeau* or elsewhere, that clearly established the high threshold to be covered by those two sections. The rules were not intended to apply to internal disturbances, nor to affect the responsibility of a Government to establish and maintain law and order by all legitimate means. He supported option 1 in section C and option 2 in section D, and looked forward to further discussion on subparagraphs (b *his*), (e *his*), (f) and (I), as well as on article Y.

98. He emphasized the importance of work by the Preparatory Commission on elements of crimes after the Conference and before the entry into force of the treaty. Work on the Rules of Procedure and Evidence could also proceed after the Conference, and ideally should be completed prior to the entry into force of the treaty.

99. An impasse had been reached on the definition of aggression in the context of individual criminal responsibility and on whether to require prior determination by the Security Council regarding State responsibility for aggression.

100. **Mr. MOMTAZ** (Islamic Republic of Iran) said that aggression should be included as one of the crimes within the jurisdiction of the Court. He therefore favoured option 1 of the *chapeau*. However, he was opposed to the inclusion of treaty crimes, because of the difficulty of deciding which to include. With respect to crimes against humanity, he welcomed the proposal that economic embargoes be the subject of further in-depth consideration.

101. As to the war crimes threshold, he preferred option 1. In section B (o), option 1 was preferable, as it included an exhaustive list of prohibited weapons. Nuclear weapons should be included.

102. In principle, he opposed the inclusion of section C on non-international armed conflicts, but his final position would depend on the results of the negotiations on the respective roles of the Security Council and the Prosecutor. He was firmly opposed to the inclusion of section D, since its provisions were not the expression of well-established international customary law.

103. It would be useful to define elements of crimes. If necessary, the task could be undertaken after the adoption of the Statute, and entrusted to the Preparatory Commission.

104. With regard to the exercise of jurisdiction covered by article 6, he said that the General Assembly should be given the same role in the maintenance of international peace and security as that of the Security Council specified in paragraph (b). He opposed option 2 of article 6 and the assignment to the Prosecutor of a role in initiating an investigation.

105. **Ms. O'DONOGUE** (Ireland) said that she endorsed the remarks made by the representative of Austria on behalf of the European Union. Her delegation's position had consistently been to support the inclusion of aggression, subject to an acceptable definition and respect for the role of the Security Council under the Charter. Option 1 was a good basis for further progress on formulating a definition. In the past, her delegation had favoured including treaty crimes, but, bearing in mind the time constraints, that issue could be left to a review conference.

106. She would have preferred not to specify a threshold for war crimes, i.e. option 3, but, in a spirit of compromise, could work on the basis of option 2. With regard to section B (o), she was prepared to show some flexibility. Ireland was actively working towards a global and comprehensive ban on nuclear weapons. Without prejudice to her position on that or other weapons such as anti-personnel mines and laser weapons, she was prepared to work on the basis of option 1. However, she emphasized the importance of including some wording along the lines of subparagraph (vi) in option 1 that would allow the Court to have jurisdiction in rapid response to developments in that area of law. She could also support the proposals of Sweden and Switzerland with respect to the *chapeau* of option 1, namely, to add a reference to inherently indiscriminate weapons and methods of war.

107. She regarded the inclusion of sections C and D as fundamental. The inclusion of elements of crimes was unnecessary, but she would not object, if that did not delay the entry into force of the Statute.

108. **Mr. van BOVEN** (Netherlands) said that he associated himself with the statement made by the representative of Austria on behalf of the European Union.

109. In principle, he favoured the inclusion of aggression, provided that a satisfactory definition could be found and the role of the Security Council could be respected. He doubted, however, whether the Conference could reach a basis for agreement, so that it might be advisable not to include it. He had always regarded the inclusion of treaty crimes to be inadvisable. The Statute should confine itself to the core crimes: genocide, war crimes, and crimes against humanity.

110. He preferred to have no threshold for jurisdiction on war crimes. However, in a spirit of compromise, he could agree to option 2 as being closer to the "no threshold" position than option 1.

111. In section B (o), he preferred option 1, if a better formulation of the review clause under subparagraph (vi) could be found. Jurisdiction on war crimes in conflicts of a non-international nature should be an essential part of the Court's jurisdiction. Further work could be done on elements of crimes after the Conference, provided that the entry into force of the Statute was not delayed.

112. **Mr. EL MASRY** (Egypt) said that he had no objection to the inclusion of genocide, crimes against humanity and war crimes. It was important to include aggression, provided that the issue of its definition could be solved. He pointed out that the discussion paper omitted option 3 of the consolidated text, which he favoured, as being the closest to General Assembly resolution 3314. Even if no definition of aggression were reached, that crime should

still be included, but the Court should not be allowed to exercise its jurisdiction until an acceptable definition had been found. As to the role of the Security Council, he supported the proposal by the Syrian Arab Republic that the Court could exercise its jurisdiction if the Security Council decided that an act of aggression had been committed. However, if the Security Council failed to do so because of a veto by one of the permanent members, the General Assembly must be able to trigger the action of the Court.

113. Terrorism, which he condemned in all its forms, should be included within the jurisdiction of the Court. However, a distinction should be made between terrorism and national liberation movements for self-determination and independence.

114. He did not favour a threshold for jurisdiction over war crimes, but could, for the sake of compromise, accept option 2. With regard to section B (o), he could not accept any list of weapons that did not include nuclear weapons. Thus he supported option 2, while reserving his position regarding anti-personnel mines.

115. He did not favour the inclusion of sections C and D, but could consider section C if safeguards such as non-interference in the internal affairs of States, a higher threshold and the guarantees contained in Additional Protocol II to the Geneva Conventions were stipulated. Elements of crimes must be included in the Statute, but, in view of time constraints, the Preparatory Commission might be charged with their examination, for possible inclusion at the first review conference.

116. **Mr. CHKHEIDZE** (Georgia) said that it was his Government's view that large-scale violations of international humanitarian law committed in non-international armed conflicts should fall within the jurisdiction of the Court. He therefore strongly endorsed the inclusion of sections C and D in the Statute. As for the threshold for war crimes, option 2 could serve as the basis for a compromise, to elicit the widest possible support from delegations.

117. **Mr. MAEMA** (Lesotho) said that he supported the views expressed by South Africa on behalf of SADC. The ICC should have automatic jurisdiction over genocide, crimes against humanity and war crimes. An acceptable definition of aggression must be found, so that it could also be included in the Statute. In view of the controversy that still surrounded questions of definition and scope, as well as time constraints, treaty crimes should be included at a later stage. The definition of genocide contained in the 1948 Genocide Convention should be adopted.

118. Crimes against humanity were acts committed on a widespread or systematic basis. Under the war crimes heading, he preferred option 2. Should option 1 be chosen, he would like to see subparagraph (vi) of section B (o) included, so that the Assembly of States Parties could add further weapons to the list. The Court's jurisdiction should extend to attacks on civilians in non-international armed conflict, as well as in international armed conflict; he supported the inclusion of sections C and D.

119. He was open-minded regarding the elaboration of elements of crimes soon after the conclusion of the Conference, but there should be no linkage between work on those elements and the entry into force of the Statute.

120. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that she supported the statement made by Austria on behalf of the European Union. Despite the attendant difficulties, she firmly supported the inclusion of aggression as a crime within the jurisdiction of the Court and therefore preferred option 1 of subparagraph (d). On the definition of aggression, she was ready to work on the basis of option 1, although she would have preferred a text that encompassed all the instances of aggression and covered all concerns. However, even a restricted definition was better than no definition at all, and better than the exclusion of aggression from the Court's jurisdiction.

121. On the other hand, treaty crimes were not of the same fundamental nature as the core crimes, for which reason they should not, at that stage at least, come within the jurisdiction of the Court.

122. She could accept the proposal concerning crimes against humanity, except that terrorism should not be listed under that heading, being adequately covered elsewhere in international law.

123. She would have preferred option 3 in the war crimes *chapeau*. However, she could accept option 2 if that met with general agreement. On the list of weapons in section B (o), she favoured option 1. The inclusion of sections C and D was crucial to the relevance of the Statute and the Court.

124. Further reflection on the elements of crimes was clearly needed. The issue could certainly be addressed by the Preparatory Commission after the Conference, provided that the entry into force of the Statute was not delayed.

125. Mr. KAMTO (Cameroon) said that he fully supported the inclusion of aggression in the Statute, and option 1 under the war crimes *chapeau*. He would welcome any improved draft that would achieve consensus. He was open-minded as to the inclusion of treaty crimes. As to war crimes, he preferred option 3 for reasons of principle and for technical reasons, although, for the sake of consensus, he could accept option 2. In section B (o), he could accept option 1, although he would prefer the inclusion of elements from the other options.

126. Sections C and D should be included. Consideration of the elements of crimes could be kept under review, either by referring to them in the Final Act or by introducing an explicit clause in the Statute that would give the Preparatory Commission a mandate to produce a paper on the subject.

127. Mr. TOMKA (Slovakia) said that he had strongly supported the inclusion of aggression but that a generally acceptable definition would probably not be found. He therefore believed that option 2 should be adopted, as that would enable the Conference to complete its work. That did not preclude the inclusion of aggression in the future, when the Statute was reviewed, once an agreement on a definition had been reached.

128. Treaty crimes differed in nature from crimes against humanity, war crimes and genocide, and should not be included in the Statute at the current stage.

129. As he saw it, the war crimes threshold was not an element in the definition of such crimes, but rather a condition for establishing the jurisdiction of the Court. He would prefer option 3, but option 2 seemed to offer a basis for compromise.

130. With regard to section B (o), he said that option 2, which had the most support, did not reflect the current state of international law. Option 1 could serve as a basis for compromise, especially as subparagraph (vi) would make it possible to take into account future developments in the area of armed conflicts and international humanitarian law.

131. Sections C and D should be included, as the majority of the conflicts in the world were non-international in nature.

132. There was no need to include the elements of crimes, as the Statute should be sufficient for the functioning of the Court. He had no objection to discussion of the issue by the Preparatory Commission, but questioned the legal force of any document produced by the Commission and its relevance to decisions of the Court's judges.

The meeting rose at 6 p.m.